

B. A. 11. Jur.

THE
THIRD PART
OF THE
REPORTS
Of Several Excellent
CASES
OF
LAW,

Argued and Adjudged in the COURTS of LAW
^{AT}
WESTMINSTER.
In the Time of the late
QUEEN ELIZABETH;

From the First, to the Five and Thirtieth Year of her Reign.

Collected by a Learned Professor of the LAW,
WILLIAM LEONARD, Esquire;

Then of the Honourable Society of GRAYS-INN:

Not before Imprinted; And now Published

By *William Hughes* of *Grays-Inn*, Esq;

With Alphabetical TABLES of the Names of the CASES, and of
the Matters contained in the BOOK.

L O N D O N, Printed by the Assigns of *Richard* and
Edward Atkins Esquires; For *Henry Twysford*, *Thomas*
Basset, *William Rawlins*, and *John Place*. 1686.



34. 11. June

THE
THIRD PART
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LAW

As adjudged in the Courts of Law
IN WESTMINSTER
In the Time of the late
JOHN ELIZABETH

WILLIAM BARNARD, Printer

By William B. of Gray's Inn

Printed and Sold by W. B. at the Sign of the Crown in St. Dunstons Church-yard

TO THE READER.

Courteous Reader,

I Can do no less than acquaint thee, That the *First* and *Second* Part of the REPORTS of that Learned Lawyer, *William Leonard*, of *Grays-Inn*, Esquire, were obtained from me, and Printed by the over-forwardness of those persons that received it from my hand, who published it with a Design to prejudice the Learned Author and my self, by false Intimating in the Epistle to the Reader prefixed before the *Second Part*, That the *First* and *Second Part*, was [All] of our Learned Authors Works, [that I thought fit to publish.] That I may Extricate my self out of their intended Abuse, and undeceive thee, I do hereby assure thee, That although I do Collect the *First* and *Second Part*, yet do I wholly disown the Epistle aforementioned, and also aver it to be a false and scandalous Assertion. That it is so, I refer thee to the View of this *Third Part*, The which is in no wise Inferior to the *First* and *Second Part*: But on the contrary, I may with Modesty say, as to the Worth and Usefulness of it, That it may Challenge the Precedence of the Other Two; the which I intended, as one that Feasted his Guests, preserveth the Daintiest Dishes until the last.

My Intention ever was, (if my other occasions would give me leave) To publish such further CASES as were Collected by him, (not before Imprinted) that might add something to the Study and Benefit of the Ingenuous Reader: Wherefore I having

To the Reader.

lately Collected (out of his Manuscript which only is in my hands) some other Cases (out of many) which lay scattering therein, not before made Publick, I have reduced them into this Third Part, which I commend to thy Reading, and leave to thy favourable Construction. And if these Cases now Printed off in this Third Part, (as the former Cases have done) shall find good Acceptance of thee, and be useful to thee, I shall willingly (if God give me life, and it be desired,) put an End to this Work. In the prosecution of the which, I shall have due regard, as I hitherto have had in this Third Part, as well as in the Two former Parts, that thou shalt be presented with nothing but what is Really useful, and not to be had in other Works of the like nature.

Now for as much as no Action or Thing done under Heaven, can be free from Error, in a greater or lesser proportion, The which, as well as other Arts, Printing too too frequently demonstrateth; yet the Errors of this Third Part are so few, and Inconsiderable, that it maketh me the more Confident to desire thy favourable Corection: Therefore I leave it to thee.

From my Study in

Grays-Inn, 24 Of

October, 1662.

William Hughes.

The

*The Names of the Learned Lawyers, Serjeants at Law,
and Judges of the several Courts at Westminster,
who Argued the Cases, and were Judges of the said
several Courts, where the Cases were Argued, Viz.*

A.

Anderson, Lord Chief Justice of
the Common Pleas.

Altham, afterwards one of the Barons
of the Exchequer.

Atkinson.

Ayliffe, Justice of the Kings Bench.

B.

Beaumont, Serjeant at Law, after Judge
of the Common Pleas.

Bromley, Lord Chancellor of England.

Barkley.

C.

Cook, after Lord Chief Justice of the
Common Pleas.

Clench, one of the Judges of the Kings
Bench.

Cooper, Serjeant at Law.

Clark, Baron of the Exchequer.

D.

Daniel, Serjeant at Law, after Judge
of the Common Pleas.

Drew, Serjeant at Law.

Dyer, Lord Chief Justice of the Com-
mon Pleas.

E.

Egerton, Solicitor of the Queen, after
Lord Chancellor.

Fleetwood, Serjeant at Law, Recorder
of London.

Fuller.

Fennor, Serjeant at Law, after Judge
of the Kings Bench.

G.

Gawdy, Judge of the Kings Bench.

Golding, Serjeant at Law.

Glanville, Serjeant at Law, after Judge
of the Common Pleas.

Gent, Baron of the Exchequer.

Godfrey.

H.

Haughton, Serjeant at Law, after Judge
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Hammon, Serjeant at Law.

Harris, Serjeant at Law.

Heal, Serjeant at Law.

Hobart.

K.

Kingsmil, Judge of the Kings Bench.

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| <i>Morgan.</i> | <i>Skute</i> , Judge of the Kings Bench. |
| <i>Manwood</i> , Lord Chief Baron of the Exchequer. | <i>Shuttleworth</i> , Serjeant at Law. |
| <i>Mounson</i> , Justice of the Common Pleas. | T. |
| O. | <i>Tanfield</i> , Serjeant at Law, after Lord Chief Baron of the Exchequer. |
| <i>Owen</i> , Serjeant at Law, after Baron of the Exchequer. | <i>Topham.</i> |
| P. | W. |
| <i>Popham</i> , Attorney-General of the Queen, after Lord Chief Justice of the Kings Bench. | <i>Wray</i> , Lord Chief Justice of the Kings Bench. |
| <i>Periam</i> , Judge of the Common Pleas. | <i>Windham</i> , Judge of the Common Pleas. |
| <i>Pepper</i> , Attorney of the Court of Wards. | <i>Walmesley</i> , Serjeant at Law, after Judge of the Common Pleas. |
| <i>Plowden.</i> | Y. |
| <i>Puckering</i> , the Queens Serjeant at Law. | <i>Yelverton</i> , Serjeant at Law, after Judge of the Kings Bench. |

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I

THE
THIRD PART
OF THE
REPORTS
OF

Several Excellent Cases,
Argued and Adjudged in the several COURTS
of LAW at *Westminster*.

In the Time of the Late Queen *ELIZ.*
From the First, to the Five and Thirtieth Year of her Reign.

In the Time of *Edw.* the Sixth.

I. 6 *Edw.* 6. In the Common Pleas.

A Man had a Warren in Fee extending into three Towns, and Leased the same by Deed to another, rendering Rent; And afterwards granted by Deed the Reversion of the whole Warren in one of the said Towns to another, and the Lessee attorned; It was holden by all the Justices in the Common Pleas, That neither the Grantor, nor the Grantee, should have any part of the Rent during the same Term, Because no such Contract can be appoxioned.

Benlow's
Rep. 12.
Owen Rep.
10.
1 And. 26.
13 Co. 57.
1 Inst. 148. a.
7 Co. 23. b.
Goldb. 44.

II. 6 *Edw.* 6. In the Common Pleas.

A Man by Deed Indented, Bargained and sold Land unto another in Fee; and Covenanted by the same Deed, to make to him a good and sufficient Estate in the said Land before Christmas next;

B

1 And. 27.

next; And afterwards before Christmas, the Bargainor acknowledged the Deed, and the same is enrolled: It was the Opinion of all the Justices of the Common Pleas, That by that Act, the Covenant aforesaid was not performed: For the Bargainor in performance of the same, ought to have levied a fine, made a feoffment, or done other such Acts.

III. 6 *Edw. 6.* In the Common Pleas.

1 *And. 32.*

IN Dower, the Tenant made default at the Summons; and now at the Grand Cape, he came and said, That he could not come, because he was in great infirmity at the time of the Summons, so as he could not appear. It was the Opinion of the whole Court, That that matter should not save his Default, because it cannot be tried, as creit de Eue, and Imprisonment may be.

IV. 6 *Edw. 6.* In the Common Pleas.

1 *And. 32.*

DEbt against Executors, who pleaded, Rics enter Maynes; which was found against them. The Plaintiff sued forth a writ of Execution: Upon which the Sheriff returned, Nulla bona Testatoris, within the County: It was the Opinion of the Court, That the same was a good Return, for it may stand with the Verdict; for it may be that they have Assets in another County. See 3 *H. 6. 11.* Where the Return is general, Quod non habent Executores aliqua bona Testatoris, that it was holden insufficient, but here in this Case the Return is special; scil. in the same County.

In the Time of Queen *Mary.*

V. 1 and 2 *Philip and Mary.* In the Common Pleas.

1 *And. 31.*

TENANT in tail had Issue two Sons, and entfeoffed his younger Son, and died: The younger Son died without Issue, leaving his Wife pregnant enfeint with a Son; the elder Brother entered: It was holden in this Case, That he was Remitted; and although that afterwards the Son was born; yet the same should not avoid the Remitter.

Mich. 1 and 2 Philip and Mary.

VI. *Stapleton and Truelocky Case.*

More Rep.
11.

William Stapleton, Executor of John Scardenyll, brought an Action of Debt against John Truelock, Administrator of the Goods of William Truelock, who died Intestate, upon a Bill sealed. The Defendant demanded Oyer of the Testament: By which it appeared, That the said Scardenyll had made the Plaintiff, and

and the said William Truelock his Executors: And in the said Will was this Clause, I Will, That my Friend William Truelock shall pay to my other Executor all such debts as he oweth me, before he shall meddle with any thing of this my Will, or take any Advantage of this my Will for the discharge of the same debts, for that I have made him one of my Executors. And upon this matter, It was clearly Resolved, that the said William Truelock could not Administer, nor be Executor before he had paid the debts. And the Defendant said, That the said William Truelock in his life had paid unto his Co-Executors all such debts which in vita sua debuit to the said Scardenyll; And also, that the said William Truelock in his life time had Administered the Goods of Scardenyll, with his Co-Executors. And in this Case, Judgment was given for the Plaintiff, and that for default of pleading: For the Defendant ought to have shewed Acquittances of the payment of the debts to his Co-Executors; and also ought to have shewed in Certainty, what debts they were.

3 and 4 Phil. and Mary.

VII. Hecks and Tirrells Case.

DEbt by Hecks and Harrison against Tirrell as Heir; Who pleaded, Nothing by Descent. The Plaintiff Replied, Assets at such a place within the Cinque-Ports: And so it was found by a Jury of the County adjoining, and Judgment given of the moiety of his Lands, as well those by descent, as by purchase: And a Writ awarded to the Constable of Dover, to extend the Lands within the Cinque-Ports. But it was said, That first the Plaintiff ought to have a Certiorari to send the Record into the Chancery, and from thence by Mittimus to the Constable of Dover.

4 and 5 Phil. and Mary.

VIII. The King and Due and Kirleys Case.

The King and Queen brought a Writ of Disceit against Due and Kirley; and declared, That one Colley was seised of certain Lands in Fee, and held the same of the King and Queen as of their Mannor of Westbury; the which Mannor is Ancient Demesne: and so seised, levies a Fine thereof to the said Due, Sur Conusans de Droit come ceo, &c. Due rendered the Land to Colley for life, the Remainder over to Kirley in Fee: Colley died; Kirley entered as in his Remainder. Kirley pleaded, That the Land whereof, &c. is Frank Fee, &c. Upon which they are at Issue: Which Issue depending, and not tryed, Due died. It was moved in this Case, That the Writ might abate. But that was denyed by the Court. For this Action is but Trespass in its nature for to punish this Disceit; and no Land is to be recovered, but only the Fine Reversed.

Mich. 4 and 5 Phil. and Mary. In the Common Pleas.

I X. *Eliot and Nutcombs Case.*

1 And. 27.

The Case was, That the Bishop of Exeter leased certain Lands in the County of Devon for years, rendering Rent payable in Exeter aforesaid, with Clause of Re-entry; and the Bishop of Exeter had a Palace in Exeter aforesaid: It was the Opinion of the Justices in this Case, That the Rent ought to be demanded at the said Palace, and not elsewhere: And if that the Lessee come to the Common Gate of the said Palace, and there tender the Rent, it is a good tender without more, be the Gate shut or open, notwithstanding that the Bishop be within the Palace, and that neither he nor any of his Servants be at the Gate for to receive it: for the Lessee is not tyed to open the Gate of the Palace, if it be shut; nor to enter into the Palace, if it be open.

X. Mich. 4 and 5 Phil. and Mary. In the Common Pleas.

1 Roll. Lane
and Pannel's
Case.

Copyhold Land was surrendered to the use of the Wife for life, the remainder to the use of the right Heirs of the Husband and Wife: The Husband entered in the right of his Wife: It was the Opinion of the Justices in this Case, That the remainder was executed for a Heir presently in the Wife, and the Husband of that was seized in the right his Wife; and, the Wife dying first, that her Heir should have it: But if the Husband had died first, his Heir should have had one Heir.

Mich. 4 and 5 Phil. and Mary. In the Common Pleas.

X I. *Joscelin and Sheltons Case.*

More Rep.
13.

In an Action upon the Case, the Plaintiff declared, That the Defendant in Consideration that the Son of the Plaintiff would marry the Daughter of the Defendant, assumed and promised to pay to him 400 Marks in 7 years next ensuing, by such portions. And upon Non Assumpsit pleaded, It was found for the Plaintiff. It was Objected in Arrest of Judgment, That one of the said 7 years was not incurred at the time of the Action brought, &c. and that appeared upon the Declaration, so as the Plaintiff had not cause of Action for the whole Money promised. And for that cause, the Writ was abated by the Court by award, although it was after Verdict. See *Br. Title, Action upon the Case*, 108.

XII. 2 and 3 *Phil.* and *Mary.* In the Common Pleas.

In an *Assise* against 4. they were at Issue upon *Nul Tenant del Franktenement* no sine en le brief And it was found by the *Assise*; That two of them were *Disseisors*, and two *Tenants*; And after *Verdict*, and before Judgment, one of those who were found *Tenants*, died; And that was moved in Arrest of Judgment: But it was not allowed of by the Court, Because the parties had not pay in Court to plead it, But it was said, That after Judgment given, a *Writ of Error* lieth.

In the Time of Queen *Elizabeth.*

1 *Eliz.* In the Common Pleas.

XIII. *Canons Case.*

Upon an Evidence to a Jury in the Common-Pleas; Upon an Issue there, this Deed was given in Evidence, viz. Sciatis presentes & futuri, Quod Ego *Richardus Canon*, filius & hæres *Richardi Canon*, Dedi, Concessi, & hæc presenti carta mea Confirmavi *Willielmo Campion* Militi, Omnia Terr. Tenementa, &c. ad usum mei præd. *Richardi* & *Joanne* uxoris meæ pro termino vitæ absq; impetitione Vassalli, ac etiam rectorum hæred. mei præfat. *Richardi*, & assignatorum meorum post decessum mei præfat. *Richardi* & *Joanne* uxoris meæ; Et si contingat me præfat. *Richardum* obire sine exitu de Corpore meo procreato, Tunc Volo, quod omnia dict. Terr. & Tenementa remaneant *Tho. fratri meo* & rectis hæredibus de Corpore suo procreatis, & hæredib. & assignat. eorum. And it was the Opinion of the Justices, That a good Estate tail was by that Deed limited to the said *Richard* in use, after the death of his Wife.

1 Roll. 839.

2 *Eliz.* In the Common Pleas.

XIV. *Holt and Ropers Case.*

In a *Replevin* by *Holt* against *Roper*, the Case was: *J. Abbot* of *W.* leased to *T.M. Knight*, a Close of Land in *B.* for 44 years, who thereof possessed, was attainted of commission of Treason, and so forfeited to the King, who seized the same: The *Abbot* and his *Covenant* surrendered, 31 H. 8. the King Leased the same to *Roper* for 21 years, and died: King *Ed. 6th* in the fourth year of his Reign, Leased the same to one *Phillips*, To have and to hold, after the Term to *T.M.* ended, for 21 years: *Roper* surrendered to Queen *Mary*, who Leased the same again to *Roper* for 30 years. In this Case, It was adjudged, That the Lease made to *Phillips*, was utterly

Post. 2426
243.

terly void, for that the King was deceived in his Grant; For the Lease made to F.M. was long time before determined by extinguishment in the Person of the King, who had it by forfeiture upon the Attainder of T.M. and the Statute of 1 E. 6. Cap. 8. Shall not help that Lease (notwithstanding the Non-recital, or Mis-recital of Leases made before:) For here is not matter of recital, but matter of Estate and Interest, which is not well limited for the Commencement of it, i. the Lease to Phillips; For there is not any certainty of the Commencement of it: For that Lease cannot begin after the Surrender of Roper, for the words of the Limitation of the beginning of it, cannot serve to such Construction.

X V. 2 Eliz. In the Common Pleas.

A Term for years is devised to A. The Executors of the Devisor entered into the Land devised to the use of the Devisee; It was the Opinion of the Court, That the same was a sufficient possession to the Devisee.

X VI. 3 Eliz. In the Common Pleas.

Two Coparceners were of a Reversion, the one of them granted his Interest in it by Fine to another; It was holden in that Case, That the Conusee should have a Quid juris clamat for a Recovery of the said Reversion.

X VII. Mich. 4 Eliz. In the Common Pleas.

The Lessor mortgaged his Reversion in Fee, to the Lessee for years, and at the day of Mortgage for payment of the Money, he paid the Money; It was holden in this Case, That the Lease for years was not revived, but utterly extinct.

X VIII. Mich. 4 Eliz. In the Common Pleas.

J. N. Cestuy que use in tail, 14 H. 8. by Indenture between him on the one part, and J. S. of the other part, In Consideration of a Marriage between his Son and Heir apparent, and Joan Daughter of the said J. S. to be had, Covenanted with the said J. S. That neither he, nor any of the Feoffees leased to his use, have made, or hereafter shall make any Estate, Release, Grant of Rent, levy any Fine, or do any other Incumbrance whatsoever of any of his Mannors, Lands, &c. But that all the said Mannors, &c. shall immediately descend or remain to his said Son, and the Heirs of his Body, after the decease of the said J. N. It was the clear Opinion of all the Justices in this Case, That by the said Indenture, No use is changed in J. N. nor any use raised to the said Son and Heir; but that it is only a bare Covenant.

Trin.

Trin. 4 Eliz. Rott. 1622.

XIX. Andrews and Glovers Case.

IN Trespass by Andrews against Glover, The Lady Mary Dacres being seised of the Mannor of Cowdam, by her Indenture bargained and sold to the said Andrews, all those her Woods, Underwoods, and Hedge-Rowes, as have been accustomedly used to be felled and sold, standing, growing, being in, upon, and within the Mannor of Cowdam, &c. To have and to hold, &c. from the Feast of S. Michael last past, during the natural life of the said Lady Mary: And the said Andrews for himself, his Heirs and Assigns, doth Covenant and Grant, to and with the said Lady, her Executors, &c. to content and pay, or cause to be contented and paid to the said Lady, her Executors, &c. yearly during the said Term, 10 l. By force of which Grant, he cuts down all and singular the Trees, Woods, and Underwoods in the aforesaid Mannor growing at the time of the making of the Indenture aforesaid. And afterwards the said Lady by her servants, felled all the other Woods and Underwoods growing in the same Mannor, after the said felling made by the said Andrews: Whereupon Andrews bringeth Trespass. And the Opinion of the Court was clear, That after the Bargainee had once felled, that he should never after sell in the same place where the first felling was made, by force of the said Grant, notwithstanding the Rent yearly reserved, and notwithstanding the words of the Grant, viz. To have and to hold, during the life of the said Dame Mary. Wherefore the said Andrews durst not Demur, &c.

More Rep.
15.
Post. 29.
Winch. Rep.
5.

X X. 6 Eliz. In the Kings Bench.

The Case was; A. is bounden to B. in an Obligation to pay to B. 20 l. at the Feast of our Lady, without limiting in Certain; what Lady-Day, viz. the Conception, Nativity, or Annunciation; And the Opinion of the whole Court was, That the Deed should be construed to intend such Lady-Day, which should next happen and follow the date of the said Obligation.

Mich. 7 Eliz. In the Common Pleas. Rott. 1851.

X X I. Scarning and Cryers Case.

In a Second Deliverance by Scarning against Cryer, the Defendant makes Conusans as Bailiff to J. S. and sheweth, That the said J. S. and at the time of the taking, &c. was Lord of the Mannor of A. Within which Mannor, there was this Custom time out of mind, &c. That the Tenants of that Mannor and other Residents and Inhabitants within the said Mannor, or the greater part of them at the Court-Baron of the said Mannor, at the Mannor aforesaid

More Rep. 79

said holden, were used and accustomed to make Laws, and impose Pains as well upon the Resiants and Inhabitants within that Hannoꝝ, and the Tenants of the said Hannoꝝ there being; as upon every Occupier of any Tenements within the said Hannoꝝ, for good government there to be had and kept, and for the preservation of the Coyn and Grasse there growing: And that the said J.S. and all those whose Estate, &c. distringere consueverunt pro omnibus pœnis sic forisfact. & per Juratores Curie præd. ex assensu dictor. Tenent. Inhabitant. & residentium ibid. in forma prædict. assensu & impositis; tam super quibuscumq; tenent. Maner. prædict. aut inhabitantibus aut residentibus infra Maner. illud, quam super occupatoribus aliquor. Tenementor. infra idem Maner: And further said, That at a Court Baron there holden, That Coram Sectatoribus ejusdem Curie, by the Homage of the said Court then charged to present, with the assent of other Tenants and Inhabitants of the said Hannoꝝ, it was Ordained and Established, That no Tenant of the Hannoꝝ aforesaid, nor any of the Resiants or Inhabitants within the said Hannoꝝ, nor any Occupier of any Tenements within the said Hannoꝝ, from thenceforth, should keep his Cattel within the several Fields of that Hannoꝝ by By-herds, nor should put any of their Dren, called Draught Dren, there before the Feast of St. Peter, upon pain, Quod quilibet tenens residens, &c. should forfeit 20s. And further said, That the Plaintiff, at the time, &c. Occupied and had such a Tenement within the said Hannoꝝ; And that at such a Court afterwards holden, viz. such a day, It was presented, that the Plaintiff Custodivit boves suos, called Draught Dren, within the several Fields by By-herds, contrary to the Order aforesaid, by which, the penalty of 20s. aforesaid, was forfeited, Notwithstanding the said pain de gratia Curie illius per quosd. A. & E. afferratores Curie illius ad hoc jurat. assensu & afferrat. fuit ad 6s. 8d. And further he said, That the place in which the taking, &c. is within the Hannoꝝ aforesaid; And that A.B. Steward of the said Hannoꝝ extraxit in scriptis extra Rotulis Curie præd. the said pain of 6s. 8d. and delivered the same to the Defendant, Bailiff of the said Hannoꝝ, to Collect and Receive; by force of which, he required the said 6s. 8d. of the Plaintiff, and he refused to pay it; and so avoweth the taking, &c. And upon this Confession of the Defendant, the Plaintiff did Demur in Law: And Judgment was given against the Confessors, 1. Because he pleaded, That it was presented Coram Sectatoribus, and doth not shew their Names. 2. The penalty appointed by the By-Law, was 20s. and he sheweth, it was abridged to 6s. 8d. and so the penalty demanded, and for which the Distress was taken, is not maintained by the By-Law; and a pain certain ought not to be altered. 3. He sheweth, that it was presented, that the Plaintiff had kept his Draught Dren; and he ought to have alleged the same in matter in fact, that he did keep, &c.

7 *Eliz.* In the Common Pleas.

XXII. *Dedicots Case.*

Dedicot seised of certain Customary Lands, surrendered the same into the hands of the Lord, to the intent that the Lord should grant the same de Novo to the same Dedicot for life, and afterwards to Jane his Wife, during the Nonage of the Son and Heir of Dedicot; and afterwards to the said Son and Heir in tail, &c. Dedicot died before any new Grant: Afterwards, the Lord granted the said Land to the Wife, during the Nonage of the said Heir, the remainder to the Heir in tail, the Heir at that time being but of the age of 5 years; so as the said Wife by force of the said Surrender and Admittance, was to have the said Lands for 16 years: The Wife took another Husband, and died; And it was the Opinion of Brown and Dyer, Justices, That the Husband should have the Lands during the Nonage of the Infant; for the Wife had her said Estate to her own use, and then her Husband surviving her, should have it, and that without any admittance, for that he is not in of any new Estate, but in the Estate of his Wife as Assignee. And it was said by them, That if a Copyholder be for years, and maketh his Executors, and dieth, that the Executors should have the Term, and that without any Admittance: Welton, contrary in that case, as to the Executors.

Dyer 210,
251.
Hob. 285.

Hob. Rep.
281.

Co. Case of
Copyholders.

7 *Eliz.* In the Common Pleas.

XXIII. *Tindall and Cobbs Case.*

Waste was brought by Tindall, Knight, against Jeoffery Cobbe Esquire; and the Plaintiff declared of a Demise of the moiety of the Mannor of Wolverton; and of the moiety of a Wood called Wolverton Wood. The Defendant pleaded, That Robert Winckfield before the Waste supposed, was seised of and in tertia parte alterius Medietatis of the said Mannor, and of and in tertia parte alterius Medietatis of the aforesaid Wood, and held the same insimul & pro indiviso with the Plaintiff; and that the said Robert Winckfield, by his Deed, sold to the Defendant omnes & omnimodas arbores & subboscos suos crescent. in prædict. tertia parte alterius medietatis prædicti bosci ad libitum ipsius Galfridi succidend. and so justified the cutting down of 300 Oaks, in which the Waste is assigned; with this, that he will aver, That the aforesaid 300 Oaks were the third part only in numero & precio medietatis omnium arbor. & subboscorum at the said time when the Waste is supposed to be done; and demanded Judgment, if Action: And divers Exceptions were taken to the Count: 1. He sheweth, that the Demise of the moiety of the Mannor was per nomen, &c. and doth not shew, that the demise was by writing; and if not, then he can-

Vaugh. Rep.
175.

not plead it by a per Nomen. 2. The Masse is assigned in digging of Clay in 100 Acres of Lands, parcel Medietark Maner. de Wolverton, and hath not shewed in what Town the Land is : For he hath shewed before, the Demise of the moeety of the Mannor of Wolverton in Wolverton. 3. He shews the Demise of the moeety of the Mannor of Wolverton, and of other Lands, and assigns the Masse in cutting down Oaks in quodam bosco vocat. Wolverton Wood, parcel præmissorum ; and that cannot be : for this Wood cannot be parcel of the Mannor of Wolverton, and of the other Lands also. And for these Causes, the Count by the whole Court was holden to be insufficient.

7 Eliz. Dyer. In the Common Pleas

XXIV. *Stamfords Case.*

Hugh Stamford, seised in Fee, had Issue A. his eldest Son, and B. his younger Son : A. had Issue George and Elizabeth by divers Women ; Hugh made a Feoffment in Fee to the use of himself for life, and afterwards to the use of George in tail, and afterwards to the use of A. in tail, and afterwards to the use of the right Heirs of Hugh : Hugh dieth ; A. dieth ; George levieth a Fine to the use of himself in tail, the remainder over to B. in Fee, and dieth without Issue : It was holden by Bendloes, Carell, Kelloway, both the Bromleys, and Kingsmill, That Elizabeth is barred by this Fine, by the Statute of 4 H.7. & 32 H.8.

XXV. 7 Eliz. In the Common Pleas.

The Case was this ; Grandfather, Father, and Son : Lands are given to the Grandfather for life, the remainder to the Son in tail ; The Grandfather and Father joyn in a Feoffment with warranty ; The Feoffee makes a Lease for years, and afterwards conveys the Land to the Grandfather for life, the remainder to the Father in Fee : The Grandfather and Father die ; The Son entreteth, and puts out the Lessee : Weston was of Opinion, That the Entry of the Son was lawful ; for it was the Feoffment of the Grandfather, and the Confirmation of the Father, and the Warranty of the Grandfather collateral to the Father and his Estate : but when the Land is re-assured, as above is said, and afterwards the Son entreteth after the death of the Grandfather and Father, now he is remitted, and the warranty gone, by taking back the Estate : and the Son is now seised of as high an Estate as his Ancestor was at the time that he departed with the Land, by which the warranty is determined. Dyer, contrary : Here had not been any discontinuance, if the warranty had not been ; for the Father was never seised by force of the entail ; And I conceive, that against a warranty collateral, one cannot be remitted ; for it binds the Right, as a Fine with Proclamation, after the Statute of 4 H.7. And I conceive,

celve, that during the possession of the Grandfather, the Warrantie is but suspended, and not determined: and although that by the death of the Grandfather it be determined; yet having respect to the Lessee, it is in being; for his Estate is derived out of the Estate which was warranted, and which descends with the Warrantie. Bendloes, One cannot make Title by a Collateral Warrantie only, &c.

8 Eliz. In the Common Pleas.

XXVI. *Simonds Case.*

In a Formedon, the Tenant vouched Rose Simonds as Daughter and Heir of Henry Simonds, Clerk; and because she was within age, he prayed that the Parol might demur. Bendloes recited the Case to be this; A Fine was levied of the Lands to Henry Simonds, upon Condition, &c. who rendered back the Land to the Conusor by the same Fine; and that the said Henry Simonds never had any possession, or seisin, but that which he had mean between the Conusors, and the Render; of which possession the Wife should not be endowed: And therefore it is a good Counter-plea to say, That the said Rose, nor any of her Ancestors, &c. for that was not such a Seisin upon which Warrantie might rise; and so if a Feoffment in Fee had been made to the said Henry Simonds to the use of another: And of that Opinion, was Dyer, Justice; for Henry Simonds had not any possession by force of which he might be vouched. Welsh, contrary; For the Fine imports in it self, that he hath a Fee, and that he hath granted and rendered the same Fee, and this Fine amounts to a Feoffment. Dyer said to Bendloes, The best way for you, is to plead the Counter-plea generally; and if he estop you by the Fine, to demur upon it. Afterwards, Bendloes moved another matter, viz. Henry Simonds was a Priest, and therefore Rose is a Bastard; and if so, then she cannot be vouched as Heir: But I would not trust the Bishop to Certifie the Bastardy, if I should plead it generally, and therefore I will plead the special matter, and so it shall be tryed by the Country. Dyer and Welsh, So you may do, if you please; and yet if you plead general Bastardy, it shall be tryed by the Country; for Rose is not a party to the Writ; and in such case, Bastardy shall be tryed by the Country.

XXVII. *Mich. 8 Eliz. In the Common Pleas.*

Note; It was said by Dyer and Brown, Justices, That if a Man devise by his Will to his Son, a Mannor in tail, and afterwards by the same Will he devise a third part of the same Lands to another of his Sons, they by this are Joynt-Tenants: And if a Man in one part of his Will devise his Lands to A. in Fee, and afterwards by another Clause in the same Will, devise the same to another in Fee, they are Joynt-Tenants.

2 Cro. 49.
Yelv. 210.

Mich. 8 Eliz. In the Common Pleas.

XXVIII. Drew Barrentines Case.

The Case was; Drew Barrentine and Winifred his Wife, were seised of the Mannor of Barrentine, which is Ancient Demesne, and holden of the Lord Rich, as of his Mannor of Hatfield, levy a Fine thereof Sur Conusans de droit, &c. by which Fine the Comusee rendreth the said Mannor to the said Drew and Winifred in special tail, the Remainder to Winifred in tail, the remainder to the Countess of Huntington in tail, the remainder to the Heirs of the body of Margaret late Countess of Salisbury, the remainder to the Queen in Fee: It was moved by Bendloes, Serjeant, If the Lord Rich being Lord of the Mannor, might reverse this Fine by a Writ of Disceit, and so Recontinue his Seignory: and he said, That he might; and thereby all the Estates which passed by the Fine, should be defeated, even the remainder which was limited to the Queen, for by it the Fine shall be avoided to all intents. Welsh, Justice, Such a Writ doth not lie; For by the remainder limited to the Queen by the Fine, all mean Signories are extinct, Then, if it be so, Disceit doth not lie. If the Tenant in Ancient Demesne levieth a Fine, and afterwards the Lord Paramount, who is Lord of the Mannor, doth release to the Comusee, and afterwards the Lord of the Mannor brings a Writ of Disceit, he gains nothing by it: And if the Tenant in Ancient Demesne levieth a Fine of it, and dieth, and the Heir confirmeth the Estate of the Comusee, and afterwards the Lord by a Writ of Disceit reverseth the Fine; yet the Estate of the Comusee shall stand. But all these cases differ from our case. For in all those cases, another act is done after the Action given to the Lord; but in our case, the whole matter begins in an instant, & quasi uno flatu, and then if the principal be reversed, the whole is avoided; For the whole Estate is bound with the Condition in Law, and that condition shall extend as well to the Queen and her Estate, as to another. And if Lands is Ancient Demesne be assured to the King in Fee upon Condition, Now during the possession of the King, the nature of the Ancient Demesne is gone; but if the Condition be broken, so as he hath his Land again, it is Ancient Demesne as it was before: and so the Estate of the Queen is bounden by a Condition in Law.

XXIX. Mich. 8 Eliz. In the Dutchy-Chamber.

Note; It was holden by Welsh in the Dutchy Chamber, That whereas King Edw. the 6th, under the Seal of the Dutchy, had demised Firmam omnium tenentium at Will Materii sui de S. That nothing but the Rent passed, and not the Land; for Firma, signifies Rent; as in a Cessavit de feodo firmæ: But the Clerks of the Court said, That their course had always been, to make Leases
in

In such manner. But Welch continued in his Opinion as aforesaid : And further he said, That this was not helped by the Statute of Non-recital, or Dis-recital, &c. for that here is not any certainty ; For sometimes (Firma) signifies Land, sometimes Rent.

X X X. Mich. 8 Eliz. In the Common Pleas.

This Case was holden for Law by the whole Court ; Two Coparceners are, and one of them dieth, her Heir of full age, she shall not pay a Relief ; for if she should pay any at all, she should pay but the moiety ; and that she cannot do, for a Relief cannot be apportioned, for Coparceners are but one Tenant to the Lord.

X X X I. 8 Eliz. In the Common Pleas.

An Action upon the Case was brought, for stopping of a Way. The Plaintiff declared, That the Duke of Suffolk was seised of a House in D. and Leased the same to the Plaintiff for life ; And that the said Duke, and all those whose Estate, &c. have used time out of mind, &c. to have a Way over the Lands of the Defendant unto the Park of D. to carry and recarry Wood necessary for the same House, from the said Park to the same House ; and further declared, That the Defendant Obstupavit the Way. It was moved by Cuius, That upon this matter, no Action upon the Case lieth, but an Assise, because that the Freehold of the House is in the Plaintiff ; and also the Freehold of the Land over which, &c. is in the Defendant : But if the Plaintiff or Defendant had but an Estate for years, &c. then an Action upon the Case would lie, and not an Assise : All which was granted by the Court. It was also holden, That this word Obstupavit, was sufficient in itself ; scil. without shewing the special matter how ; as by setting up any Gate, Hedge or Ditch, &c. for Obstupavit implies a Mans continuance, and not a personal disturbance, as a Forfeiler, or in saying to the Plaintiff upon the Land, &c. that he should not go there, or use that Way ; for in such cases, an Action upon the Case lieth. But as to any local or real disturbance, Obstupavit amounts to Obstruere : And although in the Declaration is set down the day and the year of the Obstruction, yet it shall not be intended, that it continued but the same day : for the words of the Declaration are further, by which he was disturbed of his Way, and yet so ; and so the continuance of the disturbance is alledged : And of such Opinion also was the whole Court. Leonard Prothonotary, said to the Court, That he had declared of a Prescription, habere viam tam pedestrem quam equestrem, pro omnibus & omnimodis Carugiis, and by that Prescription he could not have a Cart way, for every Prescription is stricti juris. Dyer, That is well Observed, and I conceive that the Law is so ; and therefore it is good to prescribe, habere viam pro omnibus Carugiis, generally, without speaking of Horse-way or Cart-way, or other Way, &c.

Post. 263,

Mich.

Mich. 8 Eliz. In the Common Pleas.

XXXII. *Stowell and the Earl of Hertford's Case.*

IN a Formedon in the Remainder by John Stowel and R.R. against the Earl of Hertford, the Case was; That Lands were given to Giles Loyd Daubeney in tail, the remainder to the right Heirs of J.S. who had Issue two Daughters, Agnes and Margaret, and died; The Donee died without Issue, and the Demandants as Heirs of the said Agnes and Margaret, brought a Formedon in the Remainder: And it was awarded by the Court, That the Writ should abate; For the Writ shall be brought by the Heir of the Survivor of the said two Daughters, because they have that remainder as purchasers.

Mich. 9 Eliz. In the Common Pleas.

XXXIII. *Stuckley and Sir John Thynns Case.*

THO. Stuckley, Administrator of the Goods and Chattels of one Tho. Curties, Alderman of London, brought Debt upon an Obligation, against Sir John Thynn, and demanded of him 1000 l. Et modo ad hunc diem venerunt, Tam praefatus Tho. Stuckley, quam praedict. Johannes Thynn; Et super hoc, dies datus est usq; Oct. &c. in statu quo nunc, &c. salvo, &c. At which day, the Defendant made default, and thereupon the Plaintiff prayed his Judgment against the Defendant. But the Opinion of the Court was, That he could not have it; but was put to process over, because Dies Datus, is not so strong as a Continuance.

Pasch. 10 Eliz. In the Common Pleas.

XXXIV. *Luke and Eves Case.*

IN a Replevin by Luke against Eve, The Defendant Abowed, because that the Jury at such a Leet did present, That the Plaintiff was a Resiant within the Precinct of the said Leet, &c. and that the Plaintiff was warned to appear there, and notwithstanding that made default: For which he was Amerced by the Steward there to 5 s. And so for that Amercement, he abowed the taking, &c. The Plaintiff in bar of the Aboway, pleaded, That at the time of the said Leet holden, he was not a Resiant within the Precinct of the said Leet: Upon which they were at Issue; And it was found for the Abowant. Whereupon Judgment was given for the Abowant to have a Retorn.

XXXV.

XXXV. Mich. 14 Eliz. Rott. 1120. In the Common Pleas.

The Abbot and Convent of York, Leased to J.S. certain Lands at Will; and afterwards by Deed Indented under their Convent Seal, reciting, That whereas J.S. held of them certain Lands at Will, they granted and demised that Land to the said J.S. to hold for life, rendering the ancient Rent; And by the same Indenture granted the Reversion of the same Land to a stranger for life: It was holden by the Court clear, That an Estate for life accruesh into J.S. by way of Confirmation, and the remainder unto the stranger depending upon the Estate created by the Confirmation:

Mich. 14 Eliz. In the Common Pleas.

XXXVI. Sir Francis Carew's Case.

Sir Nicholas Carew, seised of the Mannor of A. of which Mannor B. held certain Lands; B. is disseised by C. C. assures the same to Sir Nicholas Carew, who is attainted of Treason; by which Attainder, the Mannor and Land cometh to King Henry 8th who thereof dieth seised, and the same descends to King Edward the 6th, who grants the same Mannor to the Lord Darcy; who grants the same to Queen Mary, who grants the same to Francis Carew, Son of Nicholas Carew, who by Fine assures the same to the Lord Darcy; the Proclamations pass, and the 5 years pass; she who hath right to the Lands whereof the Disseisin was made, being for all that time a Feme Covert; And therefore the Fine did not bar her: But because that the King was entitled to the Land by a double matter of Record, and by the descent from Hen. the 8th, to Ed. the 6th; And also because a Reignory is reserved to the King upon the Grant made by King Edward the 6th, to the Lord Darcy; The Justices were all of Opinion, That the Entry of the Heir of the Disseisee was not lawful upon the Patentee of the Queen, but that she ought to be Relieved by way of Petition.

2 Len. 122.

XXXVII. Mich. 14 Eliz. In the Common Pleas.

A Man brought an Action of Trespass against another, for chasing of his Cwes being great with Lambs, so as by such driving of them, he lost his Lambs. The Defendant justified, because they were in his several Damage feasans; wherefore he took them, and drove them to the Pound: And it was holden by the whole Court, to be no Plea: for, although that he might take; yet, he cannot drive them with peril, &c.

XXXVIII.

XXXVIII. Mich. 14 Eliz. In the Common Pleas.

More Rep.
16, 23.

1 Len. 117.

The Case was; A. made a Lease to B. for life, and further grants unto him, That it shall be lawful for him to take fewel upon the premises; Proviso, That he do not cut any great Trees: It was holden by the Court, That if the Lessee cutteth any great Trees, that he shall be punished in Masse: but in such case, the Lessor shall not re-enter, because that Proviso is not a Condition, but only a Declaration and Exposition of the Extent of the Grant of the Lessor in that behalf. And it was holden also by the Court, That Lessee for life, or for years, by the Common Law, cannot take fewel but of Bushes and small wood, and not of Timber-Trees. But if the Lessor in his Lease granteth fireboot expressly, if the Lessee cannot have sufficient fewel, as above, &c. he may take great Trees.

XXXIX. Mich. 14 Eliz. In the Kings Bench.

2 Roll. 787.

2 Roll. 787.

In Trespass, upon an Evidence given to the Jury at the Bar, the Case appeared to be thus; Land was given to A. in tail, the remainder in Fee to his Sisters, being his Heirs at the Common Law: A. made a Deed in this manner; viz. I the said A. have given, granted, and confirmed, for a certain piece of Mony, &c. without the words of Bargained, Sold: And the Habendum was to the Feoffee with warranty against A. and his Heirs; And a Letter of Attorney was to make Libery and Seisin: And the Deed was in this manner, To all Christian People, &c. And the Deed was enrolled within one month after the making of it; And the Deed was Indented, although that the words of the Deed, were in the form of a Deed Poll: And after 4 months after the delivery of the Deed, the Attorney made Libery of Seisin. A. died without Issue, and the Sisters entred, and the Feoffee ousted them of the Land; and thereupon they brought an Action of Trespass: And the Opinion of the whole Court, was for the Plaintiff; for here is not any Discontinuance, for the Conveyance is by Bargain and Sale, and not by Feoffment, because the Libery comes too late after the Inrollment, and then the Warranty shall not hurt them: And although that in the Deed there be not any word of Indenture, and also that the words are in the first person; Yet in as much as the Parchment is Indented, and both the parties have put their Seals to it, it is sufficient. Also, It was clearly agreed by the Court, That the words, Give for Mony, Grant for Mony, Confirm for Mony, Agree for Mony, Covenant for Mony, If the Deed be duly Inrolled, that the Lands pass both by the Statute of Uses, and by the Statute of Inrollments, as well as upon the words of Bargain and Sale. And by Catline, Wray, and Whiddon, the party ought to take by way of Bargain and Sale, and he hath not election to take the Land by way of Libery: But when all is in one Deed, and takes effect equally

equally together, in such case the Grantee hath Election; but here in this Case, the Bargain and Sale (the Deed being Inrolled) doth prevent the Livery, and taketh his full effect before. And by Wray and Catline, If he in the Reversion upon a Lease for years, grants his Reversion to his Lessee for years by words of Dedi, Concessi, Feoffavi, and a Letter of Attoynp is made to make Livery and Seisin, the Donee cannot take by the Livery, for that the Lessee hath the Reversion presently.

X L. Mich. 14 Eliz.

In an Ejectione Firmæ, the Case upon Evidence appeared to be thus; The Bishop of Rochester, Anno 4 E. 6. Leased to B. for years rendring Rent; and afterwards, granted the Reversion to C. for 99 years, rendring the ancient Rent, To have from the day of the Lease without impeachment of Waste; which Grant was confirmed by the Dean and Chapter: But B. did not Attoyn; And for default of Attoynment, It was holden by the whole Court, That the Lease was void; for it is made by way of grant of a Reversion, and to pass as a Reversion. But by Catline, If the Bishop had granted the Reversion, and also demised the Land for 99 years, it should pass as a Lease to begin first after the former Lease determined. And as to the Attoynment, it was given in Evidence, That B. after the notice of the Grant to C. spoke with C. to have a new Lease from him, because he had in his Farm but 8 years to come, but they could not agree upon the price: And the Justices were of Opinion, That that was an Attoynment, because he had admitted the said C. to have power to make a new Lease unto him. Also the said B. being in Company with one R. seeing the said C. coming towards him, said to the said R. See my Landlord; meaning the said C. Bromley, Solicitor, That is no Attoynment, being spoken to a stranger. Barham, contrary, because he was present. And it was held by the whole Court, to be a good Attoynment. But it was holden, That if the Attoynment was not before that the Bishop was translated to Winchester, that the Lease should be void: and although that the Confirmation of the Dean and Chapter was before the Attoynment, so as no Estate had vested in C. yet it is good enough; for the assent of the Dean and Chapter is sufficient, whether it be before or after; by Catline, Southcote, and Whiddon: Wray, contrary.

X L I. Mich. 14 Eliz.

The King seized of a Mannor to which all Advowson is appendant, a Stranger presents, and his Clerk is in by 6 months; The King grants the Mannor, with all Advowsons appendant to it, to B. The Incumbent dieth, The Grantee may present; For the Advowson was always appendant, and the Inheritance thereof

thereof paffeth to the Grantee, and is not made difappendant by the ufurpation, as in the cafe of a common perfon, for the King cannot be put out of poffeffion. But the Patentee fhall not have a Quare Imped. of the firft difturbance, for that prefentment doth not pafs to him, being a thing in Aftion, without mention of it in his Grant. And if the Patentee bringeth a Quare Impedit of the fecond Abundance, he fhall make his Title by the prefentment of the King, not making mention of the ufurpation; yet if the Bifhop prefenteth for Lapse in the cafe of a common perfon, he ought to make mention of it; for that is his Title to the Prefentment, &c.

Mich. 14 Eliz. In the Common Pleas.

XLII. Hurfrey and Hurfreys's Cafe.

Between Hurfrey and Hurfrey, the Cafe was, That the Defendant in Debt after Judgment aliened his Land; and the Plaintiff fued forth Execution upon the new Statute: And the Court of the Request awarded him to the Fleet, becaufe that he fued forth Execution. Whereupon the Juftices of the Common Pleas awarded a Habeas Corpus, and difcharged the Plaintiff. It was faid by Bendloes, Serjeant, That the Chancery after Judgment could not enjoin the party that he fhall not fue forth Execution; for if they do, the party fhall have his remedy as above.

XLIII. Mich. 14 Eliz. In the Kings Bench.

A Man feifed of Copyhold Lands, Devifeth a certain parcel of them to his Wife for life, the remainder to his Brother and his Heirs; And afterwards in the prefence of 3 perfons of the Court, faid to them, I have made my Will, and I have appointed all things in my Will as I will have it. And afterwards he faid, And here, I furrender all my Copyhold Lands into your hands accordingly. And it was moved, If all his Copyhold Lands fhould be to his Wife, or by thofe which were fpecified in the Will. And the Opinion of the whole Court was, That the Surrender is reftained by the Will, fo as no more paffeth to the Wife upon the whole matter, but that which is mentioned in the Will; and the general words fhall not enlarge the matter.

XLIV. Hill. 14 Eliz. In the Common Pleas.

Lands were devifed to the Mayor, Chamberlain, and Governors of the Hofpital of St. Bartholomew in London, where, as in truth, they are Incorporated by another name, yet the Devife is good, by Wefton and Dyer; which Manwood alfo granted, becaufe it fhall be taken according to the intent of the Devifor: And it was faid by Wefton, If Lands be devifed to A. eldeft Son of B.
although

although that his name be W. yet the Devise to him is good, because there is sufficient certainty, &c.

XLV. *Pasch. 14 Eliz. In the Common Pleas.*

The Case was; A. seised of Lands, deviseth the same to his Wife for life, the remainder to his three youngest Sons, and to the Heirs of their bodies begotten, equally to be divided amongst them by even portions; and if one of them die, then the other two which survive, shall be next Heirs. The Devise dieth, One of the Sons dieth; and, by Dyer and Weston, Justices, The 3 Brothers were Tenants in Common in remainder. But contrary it is; where such a Devise is made between them, To be divided by my Executors, &c. there they are Joynt-Tenants, until the division is made: but here, although the words are, Equally to be divided, the same is not intended of a Division in fact and possession, but of the Interest and Title; for if a Man buyeth a *Præcipe quod reddat*, de una parte Manerii de D. in 7 parts to be divided, it is not intended, divided in Possession, but divided in Interest and Title: And it was said by the said Justices, That although one of the Brothers dieth, the two surviving Brothers have his part by purchase; and not by descent, and they are Joynt-Tenants of it. And this was the Case of one Webster and Katherine his Wife, the late Wife of John Bradbury.

XLVI. *Pasch. 14 Eliz. In the Common Pleas.*

The Case was; Lessee for years of the Pannage of the Park of H. grants all his Goods and Chattels, moveables and immoveables within the said Park; It was holden by Weston and Dyer, Justices, That the Lease of the Pannage passeth by these words. And it was said by Dyer, If a Man hath a Lease for years of a House, and grants all his Goods and Chattels being in the same House, that as well the Lease of the House as the Goods within it, pass by such a Grant.

XLVII. *Pasch. 14 Eliz. In the Common Pleas.*

Note: It was said by Weston, and Bendloes, That a *Retraxit* cannot be before a Declaration; which Leonard and Filmer, Prothonotaries, granted: And Dyer said, That it being before a Declaration, it is but a *Non suit*; and Wheatley and Filmer affirmed the same: and therefore, it was adjudged, That such a *Retraxit* in the Court of Hastings before the Sheriff, is no Plea in Bar.

XLVIII. Pasch. 14 Eliz. In the Common Pleas.

IN Debt brought against Christmas, who shewed forth a Protection, Quia Profecturus with the Lord Hunsdon to Barwick: Dyer doubted, If the Protection did lie? But said, It should be rather Moraturus, then Profecturus: For a Protection Quia Profecturus to Calceis, was never good, but super visitation. Calicii. Harper, contrary; For Barwick is out of the Realm: And he said, That he was once of Counsel, Where a Bill was exhibited in Parliament, to make Hexham part of England: and he said, That in the time of the Queen that now is, One Carre struck a Man, who thereof died at Barwick; and in an Appeal thereof, brought here by the Wife, Carre was dismissed.

Hill. 14 Eliz. Rott. 938. In the Common Pleas.

XLIX. Cranmers Case.

Dyer 309,
310.
2 Len. 5.
1 Len. 196.
1 And. 19.
More Rep.
100.
Office of Executors, 118.
119.

Thomas Cranmer, Archbishop of Canterbury, having a Reversion in Fee of certain Lands upon a Lease for years, granted the Reversion to the use of the Grantor himself for his life; and after his decease, to the use of the Executors and Assignees of the Grantor for 20 years next after the death of the Grantor; and after to the use of Thomas his Son in tail, and afterwards to the use of the Grantor in Fee: The Grantor is attainted of Treason, and the Queen gave the said Term of 20 years to the Wife of the Grantor, who took to Husband Ed. White-Church, who let the Land to A. Thomas the Son entered, and leased the same Land to one Kirk, who upon an Ouster, brought Ejectione Firme. This Case was Argued by the Justices; Manwood, the puisne Justice, conceived, That the Plaintiff ought to be barred, and that the Lessee of White-Church, who claimed by the grant of the Queen the said Term of 20 years, ought to hold the Land against the Son of the Grantor; For the remainder limited to the Son, is not yet begun in possession. And he insisted much in his Argument upon this point, That Uses limited upon any Conveyance, are governed and directed according to the Rules of the Common Law: As if a Feoffment in Fee be made unto the use of another for life, the remainder to the use of the Lessee for life, and the Heirs of his body, &c. now the party hath an estate tail executed in possession and that is according to the Rule of the Common Law. And he cited the Case of 40 E. 3. 20. Where Land was given by Fine to A. B. and C. and to the Heirs of the body of C. and for default of such Issue, the remainder to the right Heirs of A. C. died without Issue; B. dyed, and afterwards A. died; his Heir brought a Scire facias out of the said Fine: And by Judgment of the Court, the Scire facias did not lie, for the Fee was vested in the Father of the Demandant, although that ex vi verbi, the remainder was limited not to the Father, but to his Heirs: But where Uses are limited in other man-

manner than according to the Rules of the Common Law, there they shall not be ruled and governed by the Rules of the Common Law: As if Lands be given to the use of one for life, and to the use of such Lessees to whom the Tenant for life shall demise the same for years or life, rendering Rent, the remainder over to a stranger in tail, and afterwards the Tenant for life makes a Lease for years, or life, and dieth; such a Lease shall bind him in the remainder, although that the Lessor had not but for life, and be now dead: for the Use limited here to the Lessees, which would be, was limited contrary to the Rules of the Common Law. For by the Common Law, such Leases made by Tenant for life, are determined by his death: And in this Case, This Lease for 20 years, after the death of the Grantor, was limited according to the Rules of the Common Law, and therefore it shall take effect accordingly, as if it had passed in possession, and not in use, as if the Conveyance had been of the Land it self, and that Land had been granted to the Grantor for 20 years after his death, that Interest had been vested in him to sell, forfeit, or otherwise to dispose at his pleasure, and shall not accrue to the Executors as a purchase. 19 E. 2. Fitz. Covenant, 25. Land was Leased to one for life, and after his decease, to his Executors and Assigns for 10 years; the Lessee assigned the Term; And, by Herle, it is a good Assignment; For it is in the Election of the Lessee to Devise that Interest, or to assign it in his life-time. And see 39 E. 3. 25. A Lease was made to one for life, and a year over. 17 E. 3. 29. Lessee for life, so as after his death, the Land remain to his Executors for 8 years; Lessee for life died; He who had the Freehold of the Land was impleaded, who rendered the Land, and the Executors of the Lessee for life prayed to be received; scil. (where as Executors do hold the Term;) which proves, that they had the Term as Executors to the use of the Testator, and so Assets, therefore the same was before in the Lessee for life. But by Dyer, in his Argument, That Case doth not prove it, and certainly it is not Assets; For although the Executor have the same Term by purchase, yet they have it as Executors, for that is a good name of purchase, which Harper concessit: And Manwood argued further, and he Cited 19 E. 3. Fitz. Covenant, 24. Land was let for life, and if the Lessee died within 12 years, that his Executors should hold the same until the end of the 12 years; The Lessee for life died, and the Executors entered, and the Executors of the Lessee for life brought Actions of Covenant, which proved, that the Executors had the Term as a Chatel vested in the Testator, and not in their own Rights as Purchasers, by the name of Executors. See 22 Aff. 37. Land demised to A. ad totam vitam suam; Et ulterius concessit, that if the Lessee obierit infra 20 annos proxime sequent. the said Lessee potuit legare & dare prædict. tenementa alicui personæ usq; ad terminum prædict. 20 annorum, &c. And Dyer cited the Case, 16 E. 3. Quid juris clamat, 22. Land was leased to one for
hiz,

life, and if the Lessee died within the Term of 20 years, that his Executors or Assigns should have it until the end of the said 20 years, and a *Quid juris clamat* was brought against the Lessee for life without any mention of any other Estate. To which the Defendant pleaded the special matter, and demanded Judgment upon that Fine, if he should be driven to Attorn, where he is supposed Tenant for life only; And it is there said, That that special matter is but a Protestation to save the Term to his Executors. And upon such a Fine, such Tenant hath been driven to Attorn: And by Dyer, If the Lessee doth not make such protestation, yet his special interest is not impaired by it; yet it is but reason that it be entred for the more manifestation of it. 32 E. 3. *Quid juris clamat*, 5. A Lease to W. for life, and 20 years over, he may grant the same Term or any part of it: And he cited the Case between Parker and Gravenor, 3 & 4 Mar. Dyer, 150. Where a Lease for life was made, and by the Indenture of Lease Provisum fuit, That if the Lessee died within the Term of 60 years, that then his Executors and Assigns should have and enjoy the said Lands pro termino totidem annorum, which did amount to the number of 60 years, to be accounted from the date of the Indenture. And it was the Opinion of the Court, That that was not any Lease: But they all agreed, That a Lease for years in remainder might be upon a Lease for life in the same person. See 40 E. 3. A Lease was made for life, and half a year after; the Lessee died, and Waste is brought against the Executors, supposing that the Testator held for years; and the Writ was holden good: And there it is said by Kirton, That the Executors could not have that Term, unless it were in the Testator; and there the Term is not limited to any person. And see 11 H. 4. 187. Annuity granted to one for life, and 20 years after. And 50 E. Ass. 1. A Lease for life, and 3 years over to his Executors. And then here in our Case, This Use being limited in Order, according to the Rules of the Common Law, shall vest in the Grantor to give or forfeit, and then by the Attainder it was forfeited to Queen Mary: and if so, then the Plaintiff shall be barred. Harper, Justice, to the contrary; And that the Interest in the Remainder for years limited to the Executors and Assigns of the Grantor is in abeyance, and not in the Grantor, and then it cannot be forfeited: But if this Use had been limited to the Grantor himself, then all had been in him to give, &c. But here in our Case, the Remainder for years is limited and appointed to the Executors, &c. Also, Uses shall not be ruled in such manner as Lands; but the Law shall rule the possession obtained by use in another manner, than the possession obtained by the Order of the Common Law: As in the Case of Amy Townsend, Plow. Com. 111, 112. Where the Husband seized in the right of his Wife, made a feoffment in fee to the use of himself and his Wife for life, with divers remainders over; Now is not the Wife remitted, as she should be by Conveyance at Common Law: as if the Husband discontinueth the Land in the right of

of his Wife, and the Discontinuee giveth the Lands to the Husband and Wife, and to a third person, he is remitted to the whole, and the third person hath not any thing. Dyer, to the same intent; And here we ought to intend and consider, That it was the purpose of Cranmer, to advance his Executors with this Term unto their own use and benefit, and not to leave the same in himself. And I do conceive, That the use is in abeyance until the Executors are made, or an Assignee appointed; for he may make an Assignee who shall have the Term: For Assignee may be made two ways, 1 By grant of an Estate which is in the Grantor before; 2 A person nominated and appointed by another to take any thing, &c. And it shall be also intended, That Cranmer was purposed to make other Provision to leave to his Executors Assets to perform his Will; and not that that Term should be applied to that purpose, for then he would have shewed it in the Conveyance by words; scil. as to pay his Legacies, and perform his last Will: And the Cases put by my Brother Manwood, do not go to the Point; for I agree, Where Lands are given to one for life, the remainder for years, and doth not say to whom, it cannot be intended to any other but to the Lessee for life; or otherwise it shall be void. And also where Land is given to one for life, and for two years after to his Executors or Assigns, or Heirs, all is in the Lessee, for all is as one gift: But where it is given to one for life, and after his death, the remainder to his Executors, I do not see any reason that that remainder should be any Assets in the hands of the Executors; Or that if the Lessee dieth Intestate, that his Administrator should have it; and therefore the Executors shall have the same as a purchase: But Cranmer might have given the same, or appointed one in the mean time to receive it, and in the mean time it shall be in abeyance. Also if Lands be Leased to B. for life, the remainder for years to his Heirs, the same remainder for years is in abeyance until the death of the Lessee, and then it shall vest in the Heir as a Purchase, and as a Chattel, and shall go to the Executor of the Heir, &c. and the Tenant for life cannot meddle with it, for it is not in him: Also, Uses shall not be raised as Lands; i.e. at the Common Law, but shall be raised by the Statute, and as Uses were raised in the Chancery before the Statute. And therefore if this Conveyance had been before the Statute, he could not have compelled the Feoffees to dispose of that Interest at his pleasure, &c. And then Cranmer the Son shall have the Land by force of the entail limited unto him; For the Estate for years is gone, because no assignment of it is made, nor any Executors who can take it, and the Estate for life is determined by the death of Cranmer; and the Feoffee to an Use cannot have it, for there is not any Consideration whereof he should have any Use; for by the Limitation, nothing was left in the Feoffee: And so I conceive, that the Plaintiff shall recover. See the Case, 14 Eliz. in Dyer.

L. Mich.

L. Mich. 15 Eliz. In the Common Pleas.

Tottenham and Bedingsfields Case.

Owen Rep.
35, 83.

Hob. 321.

1 Len. 266.

Latch 8.

In an Accompt by Tottenham against Bedingsfield, who pleaded, That he never was his Bailiff to render accompt, the Case was, That the Plaintiff was possessed of a Parsonage for Term of years, and the Defendant not having any Interest, nor claiming any Title in them, took the Tythes being set forth, and severed from the 9 parts, and carried them away, and sold them. Upon which, the Plaintiff brought an Action of Accompt: And by Manwood, Justice, the Action doth not lie, for here is not any privy; for wrongs are always done without privy: And yet I do agree, That if one doth receive my Rents, I may implead him in a Writ of Accompt, and then by the bringing of my Action there is privy: and although he hath received my Rent, yet he hath not done any wrong to me; for that it is not my Honey until it be paid unto me, or unto another for my use, and by my Commandment; and therefore notwithstanding such his Receipt, I may resort to the Tenant of the Land, who ought to pay unto me the said Rent, and compel him to pay it to me again; and so in such case, where no wrong is done unto me, I may make a privy by my consent to have a Writ of Accompt: But if one disseiseth me of my Land, and taketh the profits thereof, upon that no Action of Accompt lieth; for it is merely a wrong. And in the principal case, so soon as the Tythes were severed by the Parsonage, there they were presently in the Plaintiff, and therefore the Defendant by the taking of them, was a wrong doer, and no Action of Accompt for the same lieth against him. And upon the like reason was the Case of Monox of London lately adjudged; which was, That one devised Land to another, and died; and the Devisee entred, and held the Land devised for the space of 20 years; and afterwards for a certain cause, the Devise was adjudged void, and for that he to whom the Land descended, brought an Action of Accompt against the Devisee: And it was adjudged, That the Action did not lie. Harper, contrary; For here the Plaintiff may charge the Defendant as his Proctor, and it shall be no Plea for the Defendant to say, That he was not his Proctor, no more than in an Accompt against one who holdeth as Guardian in Socage, it is no plea for him to say, that he is not Prochein Amy to the Plaintiff. Dyer, The Action doth not lie; If an Accompt be brought against one as Receiver, he ought to be charged with the Receipt of the Honey: and an Accompt doth not lie, where the party pretends to be Owner, as against an Abatter or Disseisor; but if one claimeth as Bailiff, he shall be charged, and so it is of Guardian in Socage. And it was agreed, That if a Disseisor assign another to receive the Rents, that the Disseisor cannot have an Accompt against such a Receiver.

L. I.

L I. 15 Eliz. In the Court of Wards.

NOte: That this Case was ruled in the Court of Wards; That where Tenant of the King, of Lands holden by Knights Service in chief, made a Feoffment in Fee of the same Lands to the use of himself for life, and afterwards to the use of his younger Son in tail, the remainder to the right Heirs of the Feoffor, and died, his eldest Son within age, That the Queen should have the Wardship of his body, and of the third part of the Land; and when the eldest Son comes of full age, that the younger Son should sue Livery, and pay Primer Seisin according to the rate and value of the whole Land, viz. of the third part as in possession, and of the two parts as a Reversioner: For the remainder to the right Heirs of the Feoffee, is in truth a Reversion; for the Fee simple was never out of him, because there is not any consideration as to that, nor any Use expressed. And because Livery shall not be sued by parcels, the younger Son shall not be suffered to sue Livery of the third part presently, and respite the residue as to the two parts in Reversion, until the Reversion fall; but he shall sue Livery presently as well of the two parts in reversion, as of the third part in possession: and if the eldest Son had been of full age at the time of the death of his Father, the younger Son should pay Primer Seisin as to the third part, the whole value of it for one year as in possession; and as to the two parts, the moiety of the value of a year, as of a Reversion.

15 Eliz. In the Court of Wards.

LII. Oliver Breers Case.

OLiver Breer, who was Tenant in Chief by Knights Service, made a Feoffment in Fee to the use of himself for life, and afterwards to the use of A. his eldest Son and Heir for life, and after to the use of the first begotten Son of the said A. in tail; and afterwards to the use of the second Son of the said A. &c. and for default of such issue, to the use of the right Heirs of the Feoffor; Oliver died, the said A. his Son being of full age; It was holden by the Council of the Court of Wards, That he should pay for his first Primer Seisin, a third part as in possession; and two parts as a reversion. See the Case before.

LIII. Mich. 15 Eliz. In the Kings Bench.

NOte: This Case was moved to the Justices in the Court of the Kings Bench: A Man had Issue two Daughters by divers Women; and being seised of Lands in Fee, he made his Will, and by the same Devised, That his Wife should have the moiety of his Lands

Lands for years, and that his eldest Daughter at the day of her Marriage, should enter into the other moiety; his eldest Daughter married and died without Issue: And the Question was, Whether her Uncle should have that moiety of the fourth part of the whole Land. Catline conceived, and said, That when the Devise which was made to the eldest Daughter, that she might enter after certain years, is not the Inheritance in her presently, and the other words void? So he said here, That it is not a purchase in the eldest Daughter, but both the Daughters should enter in Common as one Heir to their Father, until the Marriage; and then the Inheritance which was once settled in them, should not be removed. Southcote, Justice, said, There are no words of Limitation of any Estate that the Daughter should have after the Marriage, and therefore the Devise was void; and if he had limited, that the Daughter after Marriage should have it for life, the Fee-simple is vested in her before, and then she cannot have it for life. And he said, That if a Lease be made to the eldest Daughter for years by the Father, and afterwards the Land descends to her and her Sister, as unto one moiety of the Land, the Lease is determined, but not as to the other moiety. Whiddon, Justice, Where a Devise is for the benefit of a stranger, there the Heir shall take by the Devise, and not by descent. As if a Lease be made for years, the remainder to the Heir, there the Heir shall take the Land by the Devise. Catline, She hath it by Descent, and not by the Devise. But if he deviseth the Land to the Heir in tail, with this, That he shall pay a certain sum of Money unto another, there the Heir shall take by the Devise, for the benefit which may accrue to the stranger, and not by descent, for otherwise the Will should not be performed: But where the Estate of the Heir is altered by the Will, no benefit doth accrue unto another after that the Lands come to the hands of the Heir; in that case he shall have the Land by descent: And so here in this case for as much as the Devise is, That the Daughter shall enter, they both being but one Heir to their Father, shall have the Land by descent; and the words of the Will, That he shall enter into the moiety, shall be void; as, if the Devise had been to the Heir for life, there the same is void, because the Fee-simple which descendeth to her, doth drown the particular estate for life. And therefore in the principal case here, the Uncle shall have but the moiety of the moiety which is so devised, and the other Sister shall have the other moiety of the Land; and as to that moiety which is devised to the Wife for years, the same shall enure according to the Common Law, that the Uncle shall have the moiety of that; and the other Sister the other moiety.

LIV. *Mich. 15 Eliz. In the Common Pleas.*

This Case was moved to the Court by Lovelace, Serjeant; A Man Covenants with another to make and execute an estate of such Lands as should descend to him from his Father and Grandfather by a certain day, the same Lands to be of the clear yearly value of 40 Marks: And the Question which he moved to the Justices, was, That if the party had more Lands which came to him from his Grandfather and Father, than did amount to the yearly value of 40 Marks, If he was to make assurance of all the Lands, or of so much thereof only as amounted to the value of 40 Marks? And Manwood, Justice, conceived, That he should make assurance of Lands only which were of the value of 40 Marks per annum: For the words (such which) do not go so largely as if he had said, All my Lands which shall descend, or to me be descended; for then the yearly value were but a demonstration, and all his Lands ought to be assured. But here the Intent of the Indenture cannot be taken otherwise, than to have but an Assurance of so much Land; as if he had said, Of such Lands and Tenements as were my Grandfathers, and Fathers, amounting to 40 Marks by the year: for there by those words, he shall have but 40 Marks by the year. Lovelace, It hath been taken, That where the Queen made a Lease of all her Lands in such a Town, amounting to the yearly value of 40 l. that that valuation is not a demonstration, and shall not abridge the Grant precedent, to have all in the Town which should be of the value of 40 l. but her Grant shall be taken and construed according to the words precedent. Manwood, The Common case of assurance upon a settlement of Marriage is, That he shall stand seised of so much of his Land as shall be of the clear yearly value of 40 Marks; If the marriage take effect, The Question hath been, If they to whom the assurance is made, may enter into any part of the Land at their election, and take that which is the best Land, to the value of 40 Marks per annum, and hold the same in severalty, or if they shall be only Tenants in Common with the other? And also it hath been a Question, Whether they may choose one Acre in one place, and another Acre in another place, and so through the whole Land where they please, because the Grant shall be taken strong against him that granteth: But I conceive, that it should be a hard case to make such Election of Acres. But it was said by some Serjeant at the Bar, That if a Man granteth to another to take 20 Trees in his Lands, that the Grantee may cut down one Tree in one place, and another in another place; Manwood agreed that Case: but of the other Case, the Court doubted of it. The principal case was adjourned.

Mich. 15 Eliz. In the Common Pleas.

L V. *Vernon and Vernons Case.*

NOte; That in the Case of Dower between Vernon and Vernon, and the Argument of it, the Plaintiff would have been Nonfuit. Dyer, Justice, said, It should be an ill President, if a Nonfuit should be after Demurrer: And therefore he said, That for his part he would not agree, that any Nonfuit should be upon it; but he said, he would be advised, and take better Consideration of it, If the Nonfuit should be awarded, or not. And afterwards at another day, Manwood and Dyer took a difference, where the Nonfuit is the same Term, and where in another Term; and said, It is like unto the Case, where a Man would Wage his Law, and is present ready to do it, that there the Plaintiff cannot be Nonfuit, because it is in the same Term, but he shall be barred: But in another Term afterwards he might be Nonfuit, if the Defendant take day over to wage his Law until another Term; and so they said it should be in this case.

Mich. 15 Eliz. In the Common Pleas.

L V I. *Sir Peter Philpots Case.*

This Case was moved by Meade, Serjeant to the Justices of the Court of Common Pleas, viz. That Sir Peter Philpot Knight, seised in Fee of divers Mannors and Lands, suffered a Recovery, and made a Feoffment thereof unto divers persons, To the use of himself for life, the remainder to his right Heirs: And after the Statute of 32 H. 8. of Wills, He devised all his said Mannors and Land to his Wife for life; and it was expressed in his Will, That he could not devise all his Lands, by reason of the Statute of 32 H. 8. that his Will was, That his Wife should have so much which might be devised by the Laws of the Land: And there was another Clause in the said Will, That his Feoffees should stand seised of the same Mannors and Lands after the death of his Wife, To the use of one Hurlock and others for years, for the payment of his Debts, and for the raising of Portions for the preferment of his Daughters in Marriage: And further by his said Will he willed, That if the Law would not bear it, That Hurlock and the others should have the Interest, Then he willed that his Son should have all his Mannors and Lands, and should pay his Debts, and should give certain sums of Monies for the Marriage Portions of his Daughters; And the Question which was moved to the Court, was, Whether the first part of his Will, That is to say, That Hurlock and the others should have his Lands, &c. were void, or not, by the later words of his Will? Dyer, Justice, said, That the last words of the Will did well expound the meaning of the

the first words, and that the Will should be performed as it might be : And afterwards Harper said, That upon this matter, Hurlock and the others had had a Decree in the Court of Wards, to have the whole Lands during the years, and not two parts of the Lands only. Dyer, Justice, said, That the Will of Sir Tho. Umpton, which was made mean between the Statutes of 32 H. 8. and 34 H. 8. and which is excepted by the same Statute, that it should not be construed in other form than according to the first Statute was, Of all his Lands. And upon a Demurrer argued, It was adjudged, That the Will was good of two parts, although that by the Will it was not divided : For where a Man hath a Warrant to do a thing, and he doth it, and more, so as he exceeds his Warrant, yet it is good for that part for which it is warranted, and void for the rest : As if a Man makes a Warrant of Attorney to make Libery and Seisin of the Mannor of Dale, and he makes Libery of the Mannors of Dale and Sale ; it is good for the Mannor of Dale, and void for the Mannor of Sale. The Case was, in a Writ of Partition : And afterwards the Record was removed by a Writ of Error, supposing that this Court had Erred ; and the Judgment was affirmed by three of the Justices of the Kings Bench. But because there was a Discontinuance in the Record, which was erroneous, for that the first Judgment was reversed, but not for any other cause. And such was the meaning and intent of the Statute of 32 H. 8. before the making of the Statute of 34 H. 8. of Explanation of Wills. And therefore here in the principal Case, it was holden, That the Will was good for two parts, both to the Wife, and also to Hurlock and the others. And it was holden, That by the Intent of the Will, that the Son was to pay such sums of Monies a Hurlock was to have paid, so as the Will was not for the advantage of the Heir, but to be construed according to the meaning of Philpot, That if Hurlock could not have the Lands, &c. that then the Son should have them, but with such charge as aforesaid ; and it was no Intent to subvert the first part of the Will, if the same might stand with the Law. And so it was adjudged.

* L VII. Mich. 15 Eliz. In the Common Pleas.

The Case was this ; A Man makes a Lease for 30 years ; and bargains and sells the Woods in and upon the Premises to the Lessee, and that he might carry them off the Lands during the time of 30 years : The Lessee cut down all the Woods ; and afterwards other Wood grew up from the Stocks, and the Lessee cut them also within the Term ; and the Lessor brought an Action of Waste for cutting of the new Wood. And it was moved by Meade, Serjeant, If the Action of Waste would lie, or not ? Harper, Justice, Is the Bargain, de bosco & subbosco, growing in and upon the Premises ? Meade, No ; but all his Woods in and upon the Premises. Harper, The Grant is in the present tense in presenti ; so as he cannot

More Rep. 94
Post. 55.
Winch. Rep.
5.

Hob. Rep.
132.

Hob. 132.

not have that which shall grow there, after: And if he would grant all his Woods which should grow in time to come, the Grant should not be good, because it is not of a thing in esse. And if a Man will grant all his Wood growing upon Black-Acre, and there be then no Wood, he cannot have any thing, although that afterwards, Woods grow there; and if his meaning had been, That he should have the Wood which should there after grow, he would have expressed the same in another form. Mounson, If a Man grants all his Hay growing upon his Land; shall he have that which is growing there, after? No truly; And if he grant all the Wooll which is growing upon his Sheep, shall he have more than that which groweth this year? Meade, No truly: But if he had granted all the Wooll growing upon the Sheep for 20 years, then the same is like to our case, for he hath granted, that he may carry the Wooll during the 30 years. Harper, The same is but a Liberty to sell the Trees which were growing at the time of the Sale, and to carry them when he pleaseth, and not to give other Trees or Wood, which should there after grow.

LVIII. Mich. 15 Eliz. In the Common Pleas.

Lovelace, Serjeant, moved this Case to the Court, That an Assise was brought of the Office of Registership in the County of Devon: And he shewed, how that the Bishop of Exeter granted the Office, and shewed the name of the Bishop: And that after William Alley Bishop there, granted the same Office after the death of the first Grantee to the Plaintiff: And further he shewed, That the Bishop might grant the Office ad idoneam personam: And because he doth not say in his Plaint, That the person to whom it was granted, is idonea persona, I conceive, that the Plaint is not good; for if there be no such person which can exercise the Office, he shall not have it: For that is a Condition which is annexed to the Office, that he be a fit person who shall take it: And the Prothonotaries of this place ought to have skill in that which appertaineth to their Office; for if such an Office should be given to a Courtier who hath not skill in that which appertaineth to the Office, nor knowledge how to execute, he shall not have it. Also he said, That he hath not shewed, that the first Bishop is dead, or that he hath resigned; or whether that he be deprived; and therefore it shall be intended, that he continueth, unless the contrary be shewed: And then the Grant made by Alley to the Plaintiff, cannot be good. And for these causes, and for others, he prayed to know the Opinion of the Court. Dyer, Justice, The matter is not before us; and wherefore should we give our Opinions to serve the fancy of every person, and to resolve the doubts of every Court? But if the matter laid come before by Adjournment for difficulty, because the Justices of Assise are of divers Opinions, or that they doubted of any thing upon such difficulty and adjournment, we use to shew our Opinions, and to take some pains to search our Books.

to Resolve the doubts; but when we have not any thing before us; but are moved for the pleasure of the parties, What Resolutions shall we make by speaking at random? Manwood, As to the first Exception, I, nor my Brother Jeffery, do not doubt of it; but that the Plaintiff was good, notwithstanding that it is not shewed, that he was idonea persona, for the Law shall intend him so to be, until the contrary be shewed. And so it is of a grant of an Annuity, as long as he se bene gesserit, the Law shall intend that he carrieth himself well, until the contrary be shewed. But as to the other Point, That he doth not shew the death of the first Bishop, my Brother Jeffery doubted of it; but I make no doubt of it, for that is but a Recital, and the Plaintiff makes his title but from Bishop Alley, and therefore that is not material, nor parcel of his Plaintiff, whether the predecessor of Alley be alive, or not; for he doth not derive any Title from him, but from Alley. Dyer, Can a Bishop grant an Office in Reversion, without title of Prescription, that they have used so to do time out of mind? And here no Prescription is laid; that the Bishop might so do. And then, as I conceive, the Reversion of the Office cannot be granted, for there is not any Reversion of it: and it is not like unto an Advowson, which may be granted, that the Grantee may present when it shall be next void. And as I conceive, No Reversion of any Office can be granted, if not by the King who hath a special Privilege; for he reciting, how that such an one hath such an Office for life, he may grant that such a person shall have the same Office after the death of the first Grantee. And so the Queen may grant the Reversion of such an Office; as if she recite, that such an one is Keeper of such a Park, there she may grant the Keepership of it after the death of another: But if a Common person will grant the Stewardship of his Courts after the death of such a person as is now Steward, or the Reversion of it, the same is not good: For of Offices, there is not any Fee, or Reversion, But a Nomination which the party hath to name what person he pleaseth when the same shall become void. Manwood, It is the Order in the Arches, and in the Privilege Court, and of all the Courts of Pauls, to grant the Offices in Reversion, as in the Case of Doctor Drury and others, who have the Reversion of every Office which doth belong to the Spiritual Courts. Dyer, I do not care, nor regard what they do, but what they ought to do; and I do not respect the person of any one in relating the Law; But it may be, that by words of Covenant, such a Covenant may be good: And of late time here a Case hath been adjudged, That where one prescribed, that such an one might grant an Office, cuicunq; personæ idoneæ voluerit, and the Grant was made to two, and because the prescription did not warrant this manner of grant, it was adjudged void; for when the prescription is to grant alicui personæ, and not quibuscunq; personis, by that, he cannot grant it but to one person, and not unto divers, because the prescription doth not extend so far. Manwood, I conceive there is a difference betwixt such per-

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sons who have Offices for life, as the Admiral of England, the Lord Treasurer, the Justices of the two Benches, which have Offices incident to their Courts, they cannot grant any of those Offices in Reversion; But a Bishop hath a Fee, and therefore the Cases are not alike. Dyer, he hath not prescribed in the person of the Bishop here; but he hath said, That the Custom is, That the Bishop may grant the said Office, whereas in truth, if there were a prescription, he ought to prescribe, That the Bishop for the time being might grant the said Office in possession or in reversion: And so as I conceive here, no Office shall be granted in reversion, unless by prescription; which ought to be alledged. And in the time of this Queen, an Office of this Court was granted to Fry and his Son by the King; and the Patent was shewed here in Court, and rejected: and it was said, there was no place in Court for two to sit there, and the Office might be exercised as well by one, as by two; and therefore the Patent was disallowed. And although that Offices are granted to two, as now in the Kings Bench of late time, there is not any President to warrant the same; and therefore, as I conceive, such a Grant is not good, nor warranted by the Law; for I do not regard in this Case, against what persons I speak. Mounson, In the Chancery, a Patent was granted to Bagot and Swirenden, of an Office in the Chancery by King Henry the 6th, and in 9 E.4. it is disputed, Whether the Grant were good, or not, &c.

LIX. Mich. Eliz. In the Kings Bench.

The Case was; A Man Mortgage his Lands, to pay to the Mortgagee his Heirs, Executors, or Assigns, a certain sum of Money at a day certain: The Mortgagee dieth, and maketh his Heir within age his Executor; and the Mortgagor pays the Money at the day to the Heir: It was holden, The same shall be Assets in the hands of the Heir as Executor, and that he hath not the Money as Heir, and he shall be charged with it, within age.

LX. Mich. 15 Eliz. In the Common Pleas.

The Case was this; A Man had made a Lease for 40 years to one by Indenture, if the Lessee should so long live; and afterwards by another Deed he demised the same Lands and Tenements to the same Lessee, To have to his Executors and Assigns for 40 years after the expiration of the first Lease. And Lovelace, Serjeant, demanded the Opinion of the Court, (the Lord Dyer being then in the Star-Chamber) Whether in this Case, the Lessee should have the Interest in the second Lease, or his Executors; or whether it was a void Lease? Harper, Justice, said, That in every Lease there are 3 things incident to make it good, 1. That there be a Lessor to make the Lease. 2. That there be a Lessee to take the Lease. And, 3. That there be a thing which should be

which should be let : And then he said, That here, although that there be a Lessor, and a thing which should be leased, yet here there was not any Lessee: For Executors are not until after the death of the Testator: But he said, That if a Lease be made for years, or for life, and that the Executors shall have the same for certain years after his death, the same is good; for there is an Interest of the Term. And if a Man maketh a Lease to begin at the month of Easter, his Executors may have this Term, because the same was an Interest of a Term in the Lessee, and the Term shall be executed at Easter: But here in this case, there is no person to take it, and therefore he conceived, That the Lease was void. Mounson, Justice, The Case is as it is recited: And he said, That the Premises of a Deed, is to limit the person who shall have the Lease, and the Habendum shall not declare the person who shall have it, or the Lease, but to declare the Estate which shall be in the Lease; and it is but a limitation of the Estate: and if the Premises do not limit the person who shall have it, the Habendum shall not give any thing to the person, unless it be expressed in the Premises what person shall have it: and therefore when he saith, Habendum to his Executors and Assigns, these words (Executors and Assigns) are void: But when a Man makes a Lease to one, Habendum to his Executors and Assigns, the same is not void; for if Liberty be made, his Heir shall take it after his death. Harper, By the Lease of the same Land by a new Deed, as the Case is here, nothing shall pass without an Habendum: And if a Lease be made to the Lessee, Habendum to his Executors, he himself hath no Estate; and when no Estate is limited, the person in the Premises gains not any thing, and without the Habendum, he cannot have any thing. Lovelace, If I may declare my Opinion, This new Lease shall be a Lease in possession as a Confirmation of the first Lease, and shall be taken to be a Lease for life, and the Habendum shall be void; and therefore he prayed the Opinion of Manwood, Justice, therein: Who said, That in every Lease there are 3 Principals, as he had said, of Lessor, Lessee, and thing Let: And by the Premises, the Lessor and Lessee are expressed; and by the Habendum, the Interest which the Lessee shall have, ought to be set forth; and if no Habendum be in the Deed to express any certainty of time, the Lessee by the same shall be Tenant at Will, unless that Liberty be made: and therefore I am not of your Opinion, Brother Lovelace, That the same shall be a Lease for life, unless that in the second Deed the words had been, That he Leased and Granted; by which word, Grant, it might enure and amount to a Lease for life: but if the Deed had been, Demise and Grant, that cannot be intended for the life of the Lessee; And as I have said before, by apt words it might enure to a Confirmation, and make it a Lease for life; but by the Premises it is not so, and by this Deed it is not expressed, that the Lessee shall take a Freehold; for by the Habendum, his mind appeareth to be otherwise by agreement betwixt the parties, that his Executors and Assigns

should have it for a certain time after his death, and that he himself would not have it, for he hath sufficiently provided for himself, to have it for 40 years, if he liveth so long, although it cannot be intended, that he should live beyond the Term which he hath, so as it cannot be taken to be the meaning of the parties, that he should have it as a Lease for life: and when by the Premises of the Deed, the parties are not named, the Habendum shall never bring in a strange person: As, where a Lease is made to the Husband, Habendum to the Wife, the Habendum to her is void, because it shall not introduce one who is a stranger to the Premises of the Deed. And as my Brother Mounson hath said, The Office of the Premises of a Deed is to limit the persons who shall have it, and the Office of the Habendum is to limit the Estate of the thing which is granted; and therefore when the Habendum is to such a person as was not named in the Premises of the Deed, it is but a Augation: As if he had Leased to J.S. Habendum to the Moon for certain years, there the Habendum to that thing is a Augation, and void; and therefore then if the words be in the Premises, that he Lease to J.S. for 20 years, and doth not say, that he shall have it for 20 years, it shall be intended, that the person named in the Premises shall have it, for the Habendum waits upon the Grant before; and when he gives an Estate in the Habendum without limiting of the person in it, then the person named in the Premises shall have it; and then when he names a strange person who was not named before in the Premises, or which hath no Capacity, as the Moon, or such like who are not in rerum natura, as his Executors of the Lessee, or his Assigns, these persons or things named in the Habendum, are but Augations, and void; and then it is like unto the Case where no person is limited in the Habendum: And where apt words are, there the Law shall construe them strong against the Grantor; and therefore the Law couples the Habendum and the Premises together, that the intent of the parties may (if by any means it may) have a reasonable Construction. And therefore if a Man maketh a Lease to two, Habendum to one of them and a third person, there as to the third person he gets nothing by the Habendum, because he was not named in the Premises, and therefore the naming him in the Habendum is but a Augation. And so here, the naming of the Executors and Assigns by the Habendum, is but a Augation, and so there is no person named in it. But I conceive, that the Habendum, when the years are expressed, and the Estate limited by it, shall have reference to the person who is named in the Premises of the Deed, and so the Lease shall be good to him to begin after the first Term expired. Harper, It appeareth that it was the meaning of the parties, that he himself would not have any thing, but that his Will was, That his Executors should have it, and the Law shall frame his intent and meaning, and shall not subject the Law to his intent; and when he doth not so, but overthwarts the Law, and frames such an Instrument, the Law shall be first served, and not their meanings,

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when the same doth not agree with the Law. And therefore as to the Case which my Brother Manwood hath put, Where no person is named in the Habendum, by Construction of Law, he who is named in the Premises shall have it: But when the Habendum makes express mention of his intent what person shall have it, and another than was named in the Premises, then if those cannot have it, the Estate limited shall not be carried over to him who was named in the Premises. And as to the Case put, where a Lease is made to two, Habendum to one of them, and a third person, there I well agree, That as to the third person it is but a Bugation; and the other two who are named with him in the Habendum, and have a Capacity to take it, shall have it, although the other getteth nothing; but that is not like to the Case at Bar, for no person is named there. Manwood, If a Lease be made made to J.S. except Green-Close, to J.D. who is a stranger; the Exception is good; and J.D. shall have it. The principal Case was Adjourned;

Mich. 15 Eliz. In the Kings Bench.

L XI. The Lord Windfors Case.

UPON an Evidence given to a Jury in the Kings Bench, in an Ejectione Firme, the Case appeared to be thus; That Sir Roger Lewknor, Knight, being seised in Fee of the Manor of South Myms, made an Indenture, Anno 11.H.8. by which Indenture, he Leased the said Manor to 20 persons, to the use of Andrew Windfor, afterwards Lord Windfor, and Henry his Son, and the Survivors of them, as long as any of the said persons named in the said Indenture should live: And further Covenanted by the same Indenture, To stand seised of the said Manor, To the use of the said Andrew and Henry, and the Survivors of them, during the lives of any of the said Feoffees named in the same Indenture; which Deed was made without Libery and Seisin; and reserved upon it an yearly Rent: and afterwards the Son died. And in 22 H.8. A Fine was levied by a stranger upon a Release to Andrew Lord Windfor; And afterwards, 34 of Henry 8 Andrew Lord Windfor made a Lease to one for yeats; and died; and made William and Edmond his Sons his Executors: And afterwards William his eldest Son being Lord Windfor, 2 & 3 Phil. & Mary, made a Lease of the same Land unto another, to begin after the first Lease ended: Which William died, and the Lord Windfor that now is, accepted the Rent, and of late time agreed with one Vaughan, who had married the Heir of Sir Roger Lewknor, for the Reversion in Fee; and afterwards the Lease made by Andrew Lord Windfor, 34 H. 8. ended in the 4th year of the Reign of the Queen that now is; Whereupon, the second Lessee, that is to say, the Lessee of William Lord Windfor, entered; and being ousted, he brought the Ejectione firme. And then, and yet one of the 20 Feoffees of Sir Roger Lewknor is alive; so as the Estate of Cestuy que Vie, is

not as yet determined. And now the Question upon the first part of the Evidence is, If this later Lease made by William Lord Windsor, be a good Lease or not? And who shall be said Occupant? For when the Lord Andrew died, then the Lessee (as Carline said) shall not be said in otherwise than according to his Lease, when his occupation by Lease was lawful before: And he who shall be said Occupant, shall have a Freehold; and if he should be Occupant, he should be in by a new title. Then we are to see, If the Executors of the Lord which have the Rent, and to whom the same is paid by the Lessee, shall be said Occupant? And he conceived, That they should not, although that they enter, unless they claim the Freehold at the time of their entry; for if they enter generally, it shall be intended according to the Will, as Executors; and if he had granted his Estate to another, there after his death, the Grantee shall be said to be in by reason of his Grant, and not as Occupant; And so if he would devise his Estate, the Devisee shall be in by reason of the Devise, and not as Occupant; Which Case of Devise, Southcote denped, That he should not be in by reason of the Devise, when his Estate determines with his death: But if the Devisee entreteth by force of the Devise: he shall be in as an Occupant. And also Southcote denped that which had been said, That the Lessee for years who holdeth the Lands after the death of Andrew Lord Windsor, should not be an Occupant: For, as he said, the Lessee being in possession after the death of the Lord Andrew, should be said Occupant, and no other; for the Executors of the Lord could not be Occupant by the having of the Rent, because they had not the possession of the Land; for none shall be Occupant, but he who is in possession. Whiddon said, That if the first Lease made by Andrew Lord Windsor, was now in esse, and that an Ejectione Firmæ was brought upon that, that the Lessee ought to aver, That some of the Feoffees for whose lives, &c. were then living. Southcote, If a Præcipe quod reddat shall be brought, against whom shall it be brought, against him in the Reversion, or against him in possession? And if it shall be brought against the Tenant in possession, then he ought to have the Freehold; for it cannot be brought, but against one who hath a Freehold at the least: And then if the Lord William Windsor had nothing in the Land, then how could he make this Lease to the Plaintiff that now is, when the first Lessee continueth Occupant after the death of the Lord Andrew, during the life of Cestuy que Vie? And as to the Fine, the Question did further arise, If the Lord Andrew Windsor should have a Fee simple by that Fine? For being levied, (as Carline said) It cannot be to the first Uses, because a Fine upon a Release, cannot be intended to the use of any other but to him to whom it is levied, unless an use be expressed in the Fine, or by another Deed: And upon a Fine levied upon a Release made unto Tenant life by a stranger, the same is not a forfeiture of his Estate; But if Tenant for life taketh a Fine

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Sur Conusans de droit come ceo, &c. the same is a forfeiture. And although a Fine levied by those who have not any thing in the Lands, be void, Yet here it is not so; and it ought to be pleaded specially, and shewed, that he had not anything in the Land at the time the Fine was levied, as Anderson said. And Carline said, That this Fine was not without good advice, for the Lord Brook and others who were learned in the Law, were of Counsel with the Lord Windsor in the levying of this Fine, so as the intent was to settle the Fee simple in himself by the Fine, and not that the first Uses should stand after that: And thereupon he put the Case of Putnam and Duncomb, which hath much Resemblance to this Case, which he argued when he was Serjeant, and held the same Opinion as he holdeth now; And therefore he said, That although the Purchase was but of late time of Vaughan and his Wife, yet the Fee was in the Lord Windsor before, and this manner of purchase was to no other end, but to discharge the Lands of Incumbances, as appeareth by the small sum which was paid, the Land being of a great yearly value. And, as Vaughan confessed, he took this sum of Money, because that his Council informed him, that the Fee simple was in the Lord Windsor before, and that otherwise he would not have sold it at such a price. And he said, That before that agreement, the Lord Windsor told him, that he had the Fee simple in himself. Whereupon Vaughan asked him, Wherefore he paid the Rent? To whom the Lord Windsor answered, That he paid the same during the lives of the Feoffees, but after their deaths, he paid nothing; but notwithstanding that payment, that the Fee simple remained in him, and that his Counsel advised him to pay the Rent to the Heirs of Lewknor, who was the Wife of the said Vaughan. And Carline said, That if a Fine be levied upon a Release, in a Scire facias against the Conusor, he shall not plead, that the Conusor had not any thing in the Land at time of the Fine levied. And he said further; That if a Disseisor be, and the Disseisee levie a Fine upon a Release, that thereby his Right is gone.

And Note; That as to the principal Case, Southcote was of Opinion, That the Fee was not gained by the Fine levied by a stranger to him who had the Use before the Statute of 27 H. 8. and that if no Fee simple was in the Lord Windsor, at the time of the Lease made by him, that the Lease could not be good, nor the Action maintainable. And because the Court was divided in Opinions in both Points, Carline commanded the Jury to find a Special Verdict.

LXII. *Mich. Eliz.* In the Kings Bench.

NOte: That it was said by the whole Court, That if a Man delivereth Hony to another Man to buy Cattel, or to Merchandise with, although that the Hony be sealed up in a Bag, yet the property of the Hony is to the Bailee, and the Bailor cannot have an Action for the Hony, but only an Accompt against the Bailee, although that he never buyeth the Cattel or other things; for the Auditors upon the Accompt shall allow him the sum and such other allowances as they shall think fit. And that a stranger takes away the Hony, after the death of the Bailee, or in his life-time, the Bailor shall not have an Action against the stranger, but the Executors of the Bailee, or the Bailee himself during his life; And yet if the Bailee dieth, no Action of Accompt lieth against his Executors, because the Testator had the property of the Hones. And therefore if he, who takes the Hony from the Bailee, promiseth the Bailor, to pay him the like sum of Hony as the Bailee had received of him in his life, and as should be truly proved by the Bailor; there, upon that Promise, an Action upon the Case doth not lie against him who took away the Hony, as Carline said, In an Action upon the Case brought by the Master of the Rolls, and another, who supposed, that they delivered 100 l. to one Moore, and that he is dead, and that the Hony came unto the hands of the Defendant, and that thereupon he promised to pay the like sum which might be proved that Moore had of the Plaintiffs. It was holden, That the Action upon the Case did not lie. Southcote, Justice, said, That although the property of the Hony be changed as before, and that no Accompt lieth against a stranger; Yet when he hath the Hony, and for that cause promiseth to pay it as before, it is reason, that an Action upon the Case should lie upon his promise, although the Law will not charge him nor the Executor upon an Accompt.

*Mich. 15 Eliz.*LXIII. The Lord *Cromwell's* Case.

Dyer 321,
322.
2 Roll. 560,
561.

Jeffery recited, That a Replevin was brought by Franklin; The Defendants made Conulsans as Bailiffs of the Lord Cromwell; because, that the said Lord was seised of the Mannor of North-Elmes; and that the Custom of the said Mannor is, That the Homagers have used to make By-Laws (when necessity shall be) within the same Mannor, and upon a pain and forfeiture, and that the Lord of the Mannor for the time being, might distrain in the Land of any for the Forfeiture. And further saith, That in Anno 6 of Ed. the 6th, the Homage then (whereof Franklin the Plaintiff was one) made By-Law, That none should put his Sheep to feed in the Pasture of Lands of the Lord upon a pain, &c. And that the said Franklin, in the 13th year of the Reign of the Lady the

the Queen that now is, had put his Sheep into the Pasture and Lands of the Lord Cromwell, for that they avow the taking in the right of the Lord Cromwell, for not payment of the said Forfeiture: And Jefferies of Council with the Plaintiff, said, That the Avowry, nor the Conusans were not good; For the Custom is, as they themselves have shewed, That the By-Law shall be made when necessity requireth (and without necessity a By-Law cannot be:) And it is not alledged here, That there was a necessity at the time of this By-Law made; and then if there be no necessity, they cannot make the By-Law. Also, it is not alledged, that there were any Sheep there; And when a Custom is pleaded, it shall be pleaded *stricti juris*. And at the Common Law, you may see divers Cases, That when a Man is to have one thing for the cause of another, that he must alledge the thing for which he must have it: As in 9 H. 6. Where an Abbot had granted to one, That he should have Common, wheresoever the Cattel of the Abbot should go; there if the Commoner will justifie or make Avowry for his Common, he must aver that the Beasts of the Abbot went then in such a place; Field, or Pasture; for if they did not go there at the time that he justifieth or avoweth, his Justification or Avowry shall not be good: And there it was said by Babbington, Chief Justice, That if a Man grants Common wheresoever his Cattel shall go in such a Pasture, If the Grantor doth never put his Cattel into the Pasture; the Grantee shall not have Common there: and therefore he must say, That he put his Beasts into the Pasture. And in 15 H. 7. in the Case of an Annuity granted until he be promoted to a Benefice, in a Writ of Annuity brought, he must say, That he is not promoted, &c. And if an Obligation be made to you, to you my Lord, for Honey, when J.S. shall return from Rome; you shall not have an Action upon the Bond for not payment of the Honey, without alledging, that J.S. is returned. See 33 H. 6. *Hillary's Case*; And before the Statute of *Quia Emptores terrarum*, If a Man had made a Feoffment to hold by Fealty, and the Guarding of his Castle, In an Avowry for the Castle Guard, that there was then War, and so cause of necessity; for in time of Peace he shall not be bound to Guard it. And so it appeareth, 34 H. 8. Where a Feoffment was made before the Statute, to hold by Fealty, and every year to marry a poor Maiden within the Mannor, if he doth avow for not marriage, he ought to alledge, that there was a poor Maid that year within the Mannor. So, if the Censure be to repair a Bridge that is for the Common wealth, and he and all others are to have advantage of it, yet the Lord shall not avow for not repairing of it, without alledging, that the Bridge was in decay. And so when the Censure is to Cover his Hall, he shall not Avow, without alledging, that his Hall needed Reparations. And so in the principal Case, here he ought to alledge, that there was a present necessity for making of the By-Law; for it may be, that there was not any Sheep within the Mannor when the By-Law was made, and then there was no cause

cause that it should be made. And in the like manner as it hath been said of the Common Law, That certainty ought to be shewed, so shall it be by the Statute Laws. As if Tenant for life makes default, if one prayeth to be received for the default of the Tenant for life, he ought to shew that he hath the Reversion, and that he bringeth his Action by reason thereof: And as it hath been said of the Common Law, and Statute Law, so it shall be said of Custom; As in 44 E. 3 where the Parishioners prescribe to make By Laws, and that they made such an Ordinance, That for every Acre of Land, or for every Beast, every one should pay for the Reparations of the Church, &c. there it may be said in Abowry, that the Church wanted Reparation. And so where a Tax and Levy is to make a Wall against the Sea, there if the party will justify the levying of the Tax or Levy, he must say, That there was need of it, otherwise the same cannot be levied: But as to the ability of a person, he shall be enabled by Intendment. As if an Obligation be made by a Man or a Woman, in an Action brought upon the Bond, he shall not be compelled to say, That the Man was of full age, or that the Woman was a single Woman, for that shall be intended, until the contrary be shewed: But by Statute Law, if a Man pleads a Grant, it shall be otherwise. As upon the Statute of 1 R. 3. If he plead a Feoffment or a Grant of Cestuy que Use, he must plead, That he was of full age, out of prison, of sound memory, and within the 4 Seas. And so where a Pardon was made in the time of King Ed. the 4th, to all, but to those who were with Queen Margaret; there, if he will take advantage of the Pardon, he must plead, That he was not with the said Queen. And if a Man plead a Feoffment of J.S. at the Common Law, it shall be good; and if he were within age, it shall be shewed on the other side: But if a Man pleadeth a Feoffment by Custom; and the other saith, that the Feoffor was within age, and the Plaintiff replyeth, That an Infant by the Custom may make a Feoffment; the same is not good, but a Departure: for he ought to have shewed that at the beginning in his Declaration. And in 37 H. 6. Where a Man pleaded a Devise, and it was shewed, that the Devisor was within age; there the Plaintiff need not say, that the Custom is, That an Infant may devise; for that is a Departure. Another matter of the Custom which they have alledged, is, That they may make By Laws for the better Ordering; and they have not taken averment, that this Ordinance was either better or worse: and if it be not better, then they have no cause to make the By Law. If a Feoffment be made *causa Matrimonii praequiti*, it shall not be intended, that the Feoffment was for any other cause than Marriage: And if a Woman brings a Writ of Dower, and the Defendant pleads a Lease for life made by the Husband, it shall not be intended that that Lease was in allowance of her Dower according to the Statute, if it be not expressly shewed. And so, If Cestuy que Use in tail makes a Lease for life, it shall not be intended that Cestuy que Vie

is alive, unless a special Averment be taken, That he is yet alive:
And so here it doth not appear; that this is the better Order, nor
that the Lands are several, or lie in Common, so as by no means or
Circumstance it can appear if it be the better or not. Another
cause wherefore the pleading is not sufficient, is, Because he saith,
Upon a pain of Forfeiture to the Lord for the time being; and he
hath not alledged in fact, that the Lord Cromwell, who was Lord
of the Mannor in Anno 6 E. 6. was Lord in the 13th year of the
Reign of the Queen that now is; and, without shewing, that shall
not be intended. As in 7 H. 7. A Man pleads a Feoffment, and
that J.S. was seised, and did enfeoffe him, that is not good; but
he ought to plead, that he being so seised, made the Feoffment;
for it shall not be intended, that his seisin continued until the time
of the Feoffment, without shewing of it. And so where a Man
pleads, That J.S. was seised of a Reversion, granted it; he ought
to plead, And that he being so seised, granted it: And so where an
Attoznmnt is pleaded; for if he was not seised at the time of the
Attoznmnt, the Attoznmnt was not good. And so where a Man
will plead a Surrender, he shall shew, that he who Surrendereth, and
he to whom a Surrender is made, were seised. Quære, If the one
or the other were not seised, one of the Term, and the other of the
Reversion, whether the Surrender be not good. And 31 H. 6. If
a Man will plead a Lease by Feoffers to use, he shall say, And that
so seised, they made the Lease. And see 6, 7, 10, 11 H. 7. Where
Cestuy que Use makes a Feoffment, averment shall be taken, that
at the time of the Lease that the Feoffers were seised to the use
of the Lessor. And because that here it is not shewed, nor alledged,
that the Lord Cromwell is now Lord of the Mannor, it shall not
be so intended: Also, for divers other causes, I conceive, that the
Avowry is insufficient: For he hath shewed, that a By law was
made, but doth not shew when it was made, nor for what time it
was to continue; And it is not shewed, Whether the same were
made for the better ordering of the Lands which the Lord held
joyntly, or in common with others, or which he held in his own
Right alone: And as to the Prescription, I conceive that the same
is not good; because it is against reason, and not ex rationabili
causa: For if one Man keeps the Law, and another Man breaks the
Law, yet according as they have alledged this Custom to be, he
may be distrained who hath not offended, and his Cattel taken for
the Offence done by the Cattel of another Man; and it is against
reason, that any one should be punished for the default or offence
of another: But the Custom of Borough English is good; and so
is the Custom of Gavelkind, because that every Son is as good a
Gentleman as the eldest; and therefore those Customs stand with
Reason. And so in 5 H. 7. Where a Man prescribes, That for
the Pasture which the Beasts of the Tenant have taken in his Lands
in the day-time; that he have the Foldage of them upon his said
Lands in the Night to manure his Lands, is a good prescription;
because

because the party hath for it *Quid pro Quo*. And so where a Man prescribes to have a Farthing of every one who passeth over his Land, the same is called Toll traverse, and is good. And so in 7 H. 4. Where a Man prescribes in Common by reason of Vicinage, it is good; for though it cannot be of Common Right, yet because each hath *Quid pro Quo*, it is good. And so is the Custom for Fishermen to dry their Nets upon the Banks of the Lands of other Men lying upon the Sea Coasts, because it is for the Common wealth; and every Man hath an advantage by it, but if a Man should prescribe to fowle there upon the Lands of another, that were not good. Meade, contrary, That case is, as it hath been put; and divers Cases of the Common Law, Custom, and Statute Laws, have been shewed: And by common Intendment, it is intended, that need doth require the making of the By-Law; for otherwise, they would not have made it; and there needs not any averment, that there was need of it, for that shall be taken by Intendment: As 19 E. 4. A Man counts of the Grant of the next Avoidance, and the Count is good, without shewing, that that was the next Avoidance, but yet it would have been better, if it had been expressed. And 21 H. 7. In Trespass, the first day of May, the Defendant pleads the Licence of the Plaintiff; without shewing, that it was for the same Trespass: and yet it shall be intended, when he pleads a Licence for the same day, that it was for the same Trespass. And as to the Case put upon the Statute of 1 R. 3. it hath been ruled otherwise; for it shall be shewed on the other side, that he was within age, as it appeareth by 10 & 13 H. 7. Also he said, that the Court here shall intend, that there was a necessity sufficient, without expressing of it; and if there was not, then it ought to be alledged on the other side: As 15 H. 7. An Annuity is granted until he was advanced to a Benefice, the Plaintiff shall not need to shew it, but that shall come on the Defendants part; And the Statute which is, That no Cattel of the Plough shall be distrained where the party hath other Cattel of which a Distress may be taken, there the party needs not to alledge, that he had other Cattel, or other Goods. And as to that which hath been said, That it was the better Order, that needs not, for the Defendant himself was one of the makers of the Order; and when By-Laws are made, they shall not extend but to the Tenants within the Mannor where they are made, and to such only as have Lands there, and not to the Lands of others which are out of the Mannor: and the Defendant in this case shall not be received to say, but that this is a good Custom and Order, because he is a party to it, and was the maker of it, and that there was then a necessity for the making of it, for the better ordering of the Lands; and that especially when as the Defendant himself was a party to it: And as to that which is said, That Seisin is alledged in the Lord Cromwell in 6 E. 6. and it is not alledged, that the Seisin did continue in him until 13th of this Queen; It shall

shall be intended, that he continued seised until the contrary be shewed. As in 11 H. 7. A Man prescribed to have Common by reason of the House, &c. The Abowant doth not say, that he was seised of the House at the time, &c. of the disseisin of the Common, because he once alledged Seisin of the House, and that Seisin shall be intended to continue unto the time of the disseisin. And so 10 H. 7. A Prior Domus & Ecclesie de C. brought Waste, and supposed, that it was to the disinheritance of the House, and did not say, prædict. Domus; and yet it was good, and shall be referred to the said Prior: And so here, when he saith, that he was Lord, and that the By-Law was made as before, and a penalty imposed, and a Distress taken by the Bailiff of the Lord Cromwell, for not observing the By-Law, and payment of the sum assessed, all being put together, makes a sufficient certainty, and that the Lord Cromwell continued his Seisin of the Manor and Land: And as to that which hath been said, That the By-Law made, and the Custom alledged to distrain in the Lands of any Man for the Offence of another, is not reasonable, and against the Law: To that he said, That the Tenants here had authority to make By-Laws, and by their consents have bounden themselves to the observing and performance of them, and therefore shall not now be received to say, That the By-Law made by themselves was against the Law. And he said, That the Customs in some places are, Where there are Waste Lands, that they may make By-Laws, That if any Tenant or person dig Turfs in the same Waste, that the Lord may distrain for such offence within any place of the Manor, and the Cattel of any person. Quære of it. The Principal Case was Adjourned.

Mch. 15 Eliz. In the Common Pleas.

LXIV. *Mountford and Catesby's Case.*

AN Action upon the Case was brought by Mountford against Catesby; And the Plaintiff declared, That the Defendant covenanted, assumed and promised in Consideration of a certain sum of Money to him paid; and in Consideration of the payment of a Rent of certain Lands demised to the Lessee, That he should peaceably and quietly enjoy the same, without Interruption of any person, and he was ousted by a stranger; And the matter aforesaid was found by special Verdict: And it was argued by Lovelace, Serjeant; and he prayed Judgment for the Plaintiff: And he said, That there is a difference, when it is said, that a Man shall hold and enjoy peaceably and quietly; As in Case where one warrants Land, there if he be ousted by a stranger who hath not any Title to the Land, he shall have an Action of Trespass against him: But a Man by word, or Covenant, may bind himself to that which he is not bound to do by the Law. As, if the Covenant and

Dyer 328.
Vaugh. Rep.
120.

Hob. Rep.
35.1 Roll. 434.
1 Inst. 389. a.
1 Len. 29.Roll. Tit.
Conditions.

Promise he, That he shall leave the Houses in as good plight as he found them: there, although the Law doth not bind the party to re-edifie the Houses in case they be overthrowen by tempest of Wind; or that they be destroyed by Enemies; yet by his Special Covenant he shall be bound to re-edifie them. Meade, contrary, And that this promise shall not be taken strictly against the Lessor, that he shall enjoy it against all persons, but only against all persons who have Title, and not against those who have not any Title, because against them he may have his remedy. And if a Man makes a Feoffment of his Lands with Warranty, and covenants, that it is discharged of all Rents, there it shall not extend to Rent Services which are incident to the Lands of Common Right: In 3 H. 7. 4. the Case was, The Condition of an Obligation was, That the Obligor should make Appropriation of the Church of Dale such a day to such a House, at his Costs and Charges discharged of Incumbrances; there, although there was a Pension granted there-out to another, it was holden, That the Obligee was not bounden to discharge it of that Pension; No more than if a Man be bounden to make a Feoffment of his Land, there, although that he charge the Land, yet he shall not forfeit his Bond: But if it were, that he should make a Feoffment of his Land discharged, &c. it is otherwise; but yet he shall not be bounden to discharge it of such things with which it is charged by the Law. Barham, The words are precisely, That he shall enjoy it without interruption of any person, so as he be interrupted by one that hath Title, or no Title, the Plaintiff hath cause of Action. Manwood, What if the words were, That he should enjoy it without Suit in Law? Meade, That shall be intended of a lawful Suit: And in the principal case, although the Contract be by words, yet it is upon a good Consideration; that is to say, Of a Fine and Income, and upon the payment of the Rent: And therefore as Dyer said, When Catesby the Son leased the Lands to Mountford, the now Plaintiff, and it appeared that his Father, or a stranger, made claim to it, and thereupon he made the promise as before, shall it be intended, that he should hold and enjoy the Lands peaceably without interruption of them only who had Title? And that he should not have his Remedy against the Defendant upon his promise, if a stranger who had not Title did interrupt him? Truly, he shall have his remedy against him: As if the Son had promised that he should enjoy it against his Father; or else that in truth if it were the Land of the Father, shall it not be intended, that the Son did presume that his Father should not interrupt his Lessee? And that he would so deal with his Father, that he should not interrupt him: and it may be, that upon the presumption of the good will of his Father, or that he had treated with him, or compounded with him; that for these, or the like causes, the Son made the promise aforesaid: And if the Father had not any Right or Title to the Land, should not the Lessee have his Action against the Defendant, if the Father did interrupt

rupt him, for this unlawful Interruption? Truly, Yes; For by the words it is to be supposed, That the Son would so deal with his Father, that the Lessee should enjoy and hold the Lands without any manner of interruption. Mounson, You have well tasted the Opinion of the Court upon this matter before, and now you hear our Opinions again. Manwood, As I said the other day, Cannot an Hostler take upon him, that the Goods of his Guests which are within his Inn, shall be safe, and charge himself further therewith, than he is chargeable by the Custom of the Realm, and to be chargeable against every one that taketh them away? Truly, I conceive he may. Harper, The common making of Assurance is, That he shall enjoy them without any lawful Interruption: And if the Law, upon the general words of Enjoying without Interruption, should be intended but of lawful Interruptions, It were in vain to have this word (Lawful) in the Deed, &c.

1 Roll. 419:

LXV. Mich. 15 Eliz. In the Common Pleas.

A N Action of Debt was brought against one upon an Obligation. It was upon an Apprentice Bond; The Condition of which was, That if such a one did become the Apprentice of the Obligee, and transport his Merchandises beyond the Seas, and make a Return of them, and maketh an Account unto the Obligee, and payeth the Monies upon his Account within a certain time, that then, &c. And afterwards, the Obligee doth release by Deed to the Servant the Apprentice, and not to the Obligor: And in Debt brought against the Obligor, he pleaded the Release. And it was said by the Lord Dyer, and by the whole Court, That by the Release to the Servant, the Obligation was saved, if the Release were made before any forfeiture; or that the Servant or Apprentice had broken any of the Conditions, or any point according to the Covenants: but if it was made after any of them was broken, then such a Release to the Servant, did not dispence with the Obligation which was made by the stranger, because an Obligation once forfeited, cannot be saved by any Act or Release made or done to a stranger.

LXVI. Mich. 15 Eliz. In the Common Pleas.

I N a Quare Impedit brought by the Patron against the Archbishop of York, and the Incumbent, who was in the Collation of the Archbishop, after the death of the Incumbent of the Patron. It was said by the Lord Dyer, That of an Avoidance by Resignation, or Depreciation, the Patron shall have 6 months time, after notice thereof given unto him, to present his Clerk, because it may be done secretly, in the Chamber of the Ordinary; and therefore in such case the Law is, That the Bishop is to give notice of it to the Patron, before he be bound to that knowledge of such

Dyer 327.

such a Presentment; as it appeareth by the Case in 1 H. 7. 4. And Lowe, the Prothonotary said, That so is the Roll of the same year, where the Issue was, Whether the Patron had 6 months after the notice? And then the Lord Dyer said to the Prothonotary, Shew me the Roll at another day, that I may compare it with my Book. But if the Church become void by death of the Incumbent, there the Patron is to take notice of it at his peril, without any other notice thereof to be given him by the Ordinary: And he said, That if the Patron doth present his Clerk a Clerk before the 6 months be ended, and the Ordinary doth refuse the Clerk for Inability, because he is unlearned, and then the six months pass before he presenteth another, after the six months after the death of the Incumbent; in such case, the Bishop shall have the Collation of the Clerk, because it was the folly of the Patron, that he did not present his Clerk before, so as the Ordinary might examine him; and that thereupon if he be found to be unable, that he might present another Clerk to the Ordinary within convenient time, and for that cause is the 6 months given to the Patron, that he provide another Clerk in the mean time. And there is a good Case in 14 H. 7. which was long debated. Where the Ordinary commanded the Clerk to come to him afterwards to be examined, because the Ordinary had then other business. And there the better Opinion of the Book is, That it was a good Plea for the Ordinary, That he did not refuse the Clerk, but that the Clerk did not return to him again, and that the 6 months passed, so as he made the Collation, and that the Patron made his presentation too late, so as he had not convenient time to examine him. Then in the Case at Bar, It was moved, That when the Ability and Disability of the Clerk came in Question, by whom the same should be tryed; because in the Case here, the Bishop of York was a party to the Suit, Whether by the Metropolitan of York, or by the Metropolitan of Canterbury. And he said, That as he conceived, the Tryal of the Ability should be by the Metropolitan of York, and not of Canterbury: But he said, That if the party in whom the disability was alledged was dead, so as he could not be examined, the Tryal of his Ability or Disability should be by the Country, as it appeareth in the Book of 39 E. 3. Manwood, Justice, The Cure of Souls is to be regarded, and therefore if an Infant be to make a Presentation, the same shall not be stayed for his Nonage; and therefore if in such case he doth surcease, and shall not present his Clerk, the Law which regardeth more the Cure of Souls than the Enfranchisement, will permit that the Ordinary shall collate to the Church, if a Presentment thereto be not made within the six months. And he said, That if the Patron should present one but a week before the end of the six months, and the Ordinary should refuse him for disability: If the Patron should have other six months then next after, he might then likewise present an Infant or other disabled person to the Ordinary,

dinary, and so detract the time by fraud, and so the Lapse by such great fraud should never devolve to the Ordinary, and so the Cure should be unferved; And so the Issue would be and arise upon the conveniency of the time. And as to that which hath been said, concerning the Ability and Disability of the Clerk, I conceive the same shall be tryed by the Metropolitan of Canterbury, and not by the Metropolitan of York. Mounson, to that intent; and he said, There is a good case in 14 H. 7. 21. which is a short case, and not the Case which hath been vouched; by which it appeareth, that the presentment that shall be within 6 months, shall be accounted from the time of the Avoidance, and not from the time of the presentment, by the whole Court: And there it is said, That the Ordinary shall give notice to the Patron, if he be a Lay man, of the Disability of the Clerk, but not if he be a Spiritual person: But if the party Presentee be Criminous, of that the Patron shall take as well notice as the Ordinary. And afterwards, the Lord Dyer caused the Record to be read, and it did not appear therein, at what day the Presentment was made to the Ordinary; which ought to have been shewed: for the great point of the Case doth rest here upon the time of the Presentment, if it were before a week that the six months were ended or not. Also the Ordinary saith in his Bar, That the Clerk was insufficient, and that he gave notice to the Plaintiff, and that Nullam idoneam personam presentavit: And the Court said, That that was no good manner of pleading; but it had been better, if it had been Nullam etiam personam idoneam presentavit, and the first form would be a Jeofail. Manwood saith That the time of the notice given to the Patron, ought to be alledged, because if the Patron sends his Clerk within a month after the Avoidance, and the Ordinary will not give notice to the Patron in the mean time; the same shall not be any default in the Patron: And as to the notice given to the Patron, he said the same was well pleaded, and it shall be intended that it was given to the person of the Patron. And as to the words in the Declaration, scil. tunc vacantem, they are but void words, because nothing is spoken before of any time. And the Incumbent pleaded the same Plea, as the Ordinary pleaded. And Dyer asked, If the Incumbent were Person impersonae, for that none should plead that Plea, but he who is Parson in fact, and Incumbent.

LXVII. Mich. 15 Eliz. In the Common Pleas.

The Case was, That an Information was exhibited into the Court of Common Pleas, for the Queen and the party, upon a Penal Law; And a Subpoena issued forth against two: one of them was served with the Writ, and the other not; and now, a new Subpoena was prayed against him who was not served: And Dyer, Justice, conferred with his Companions and the Prothonotary, and demanded of them, If the Plaintiff might Exhibit an Information in this Court? Who answered, That he might; for this is a Court of Record, and the Statute Law limiteth, That it may be exhibited in any of the Queens Courts of Record. Then he demanded of them, If a Subpoena lay out of this place? And Whetley, Prothonotary, said, That it did. Dyer said, It is a strange thing to have an Attachment at the first day. Manwood said, In this Court it is the common usage, upon an Audita Querela, to award a Venire facias against the Conusee. Dyer, said to the Prothonotaries, Advise with your selves against the morrow, What Process hath been used to issue forth upon the Presidents of Information which have been before this time, If a Subpoena shall be awarded. And afterwards it was said by Gawdy, who moved for it, That he might have a Subpoena upon this matter.

LXVIII. Mich. 15 Eliz. In the Common Pleas.

Note: A special Verdict was found at the Bar, and the Issue was taken upon a Traverse; And Dyer, Justice, said, That a special Verdict could not be taken upon a Traverse, but precisely according to the Issue, and so it was agreed by the whole Court here; but some Serjeants at the Bar did doubt of it.

LXIX. Mich. 15 Eliz. In the Common Pleas.

In an Ejectione firmæ, the Case was thus: King Henry the 8th was seised of certain Lands, and by his Letter Patents granted the same to Thomas Holt for life, the remainder to John Holt his Son, who in truth was a Bastard; and the Letters Patents were, Ex certa scientia, & mero motu, &c. And because the Plaintiff did suppose, that the same was not a good Purchase, he tooke a Lease from the Queen, of the Lands, intending to make void the Letters Patents, because the Defendant was nullius filius. And what difference there was in such a Case, in Case of the King and a Common Person, was moved to the Court by Lovelace, Serjeant. Dyer, Justice, I conceive, That it is a good Purchase in Law as well in the Case of the King, as in the Case of a Common Person. And see to that purpose, 39 E. 3. and in this Case, If the King had granted the Land to John Holt without naming

ming him Son, the same had been a good Purchase: But if the King had called him John, the Son of Thomas, without giving him a surname, there such a Purchase should not be good, if he were a Bastard; because he hath not Nomen Cognitum, as where he hath a surname: and a Son cannot purchase by the Name of John only; and then if he be called John, the Son of Thomas, when he is not his Son, it cannot be good. And such Case hath here lately been adjudged, Where the Lord Powis gave certain Lands to Thomas Gray his Son, by him begotten upon the Body of Jane Orwell; and in truth the said Thomas was a Bastard of the said Lord Powis, (and the name of Jane was not Orwell, but the Daughter of one Punt; and the Mother of Jane, who was first married to Punt, betwixt whom Jane was begotten, married with one Orwell;) and yet notwithstanding that wrong Name, and that the said Thomas Gray was not the Son of the Lord Powis, born of Jane Orwell, but of one Jane Punt; yet it was a good Purchase and Gift to Thomas Gray, because it was his known Name. Manwood, As I take it; the Letters Patents are Ex certa scientia, & ex mero motu; and then the Kings Grant shall not be taken in such plight as the Grant of a Common Person, void for uncertainty, because that the King takes notice of the Person, of what degree he is; and in the Kings Case, where he takes knowledge, by the words, Ex certa scientia, there all matter of uncertainty shall be avoided and made good; but not matter which is not true: And for uncertainty, he said, Where a thing may be taken two ways, there without the words, Ex certa scientia, &c. the best shall be taken for the King; and strongest against the Patentee. But by Dyer; by the words, Ex certa scientia, &c. that uncertainty is saved, and shall be taken strong for the Patentee; and if it can any ways be taken for him; then the Patent shall not be void: and then when in the principal Case, there is the word (Son,) and the word (Son) may be taken two ways, either for a base Son, or a true Son; there by the words, Ex certa scientia, the King taketh upon him to know in what manner he is Son; and a base Son is a Son Quodam modo, so as the Letters Patents shall not be false: But where the King, in his Letters Patents recites a thing which is false, that shall not make the Patent good, although the words be, Ex certa scientia, ex mero motu.

LXX. Mich. 15. Eliz. In the Common Pleas.

NOte; It was agreed by the Court, That if a Son in a Replevin pleadeth, and they are at Issue, and the Jury is charged, and gone from the Bar, and returns to give their verdict, and the Plaintiff be non-suit, their return irreplevisable shall not be awarded, as in case if a verdict had been given; But the party may have a Verdict of second Deliberance, as well as if he had been nonsuit before declaration or appearance.

LXXI. Trin. 15 Eliz. In the Common Pleas.

The Case was; The Husband levied a Fine of his Land, and died, and his Wife within the 5 years after the death of her Husband, brought her Writ of Dower, but did not pursue her Writ, until 6 years were past, and then she would have revived her Suit. And Meade, Serjeant, demanded the Opinion of the Justices, If the Wife should be barred of her Dower, or not? And by Manwood, Justice, it was moved again, If they at the Bar did agree, That if a Fine be levied by the Husband, and the Wife doth not make her claim within the 5 years, if for that she shall be barred? And he conceived, That she should not be barred; For he said, That he who hath Title to the Land at the time of the Fine levied, if he doth not sue within 5 years after his Title accrued, should be barred: But where the Title accrues after the Fine, there he who hath Title shall not be barred by the 5 years; but he may come 30 years after, and make his Title and Claim. But in the principal case he said, That if the Fine had been levied after the death of the Husband, there the Wife should be barred, if she did not pursue her Right and Claim within 5 years: And he agreed, That if the 5 years be a Bar here, that then by the Wives suffering of her Writ of Dower to be discontinued till after the 5 years were past, that she should be barred, because vigilan-ribus & non dormientibus subveniunt Leges. Harper said, That the Discontinuance should be no Bar unto her; For he said, That if a gift be made to one in tail, the Remainder over, and Tenant in tail dieth without Issue, and he in the Remainder brings a Formedon in the Remainder within 5 years, and discontinueth it, yet it is no Bar, but that after the 5 years ended, he may revive his Suit: Which Manwood denied: And then Dyer came into the Court, and the Case was moved to him: And he said, That the not prosecuting of the Action by the Wife, should be a Bar unto her: and that the Marriage which was before the Fine, was the cause of Dower, although she could not come to be endowed, until after the death of her Husband: And he said, That the Wife could make no other to have her Dower, but only by bringing of her Writ of Dower; and therefore if she did surcease her time until the 5 years were past, that her new claim by her new Writ, would not revive the Ancient Claim, and that therefore she should be barred; For she could not enter into the Land to defeat the Fine: And he said, That as to the principal Case, That it was adjudged, Anno 4 H. 8. And it was also said by the Court, That an Assignment of Dower made to the Wife in the Court of Wards, was no sufficient claim of the Wife; because she cannot have a Writ of Dower there; and there by this surceasing of her demand of her Dower for the 5 years at the Common Law, that she should be barred.

LXXII. Trin. 15 Eliz. In the Common Pleas.

The Case was; A Man made a Lease for years, and the Lessee Covenanted to make Reparations; The Lessor granted the Reversion to another, and the Lessee for years made his Wife his Executrix, and died: It was holden in this Case by the Court, That the Grantee of the Reversion should not recover damages, but from the time of the Grant, and not for any time before: But yet the Wife the Executrix should be charged for the not Reparations as well in the time of her Husband, as in her own time: And if she do make the Reparation, depending the Suit; yet thereby the Suit shall not abate, but it shall be a good cause to qualify the damages according to that which may be supposed, that the party is damaged for the not repairing from the time of the purchase of the Reversion, unto the time of the bringing of the Action. And it was said by Manwood, That by the Recovery of the damages, that the Lessee should be excused for ever after, for making of Reparations; so as if he suffer the Houses for want of Reparations to decay, that no Action shall thereupon after be brought for the same; but that the Covenant is extinct.

LXXIII. Easter Term. 15 Eliz. In the Common Pleas.

Lovelace moved the Court, that in the Kings Bench this case was argued upon a Demurrer there; A Feoffment was made by one Coxley, who took back an Estate for life, the remainder to him who should be his Heir at the time of his death, and to the Heirs males of his body begotten: And afterwards, the Tenant for life after the Statute of 32 H. 8. suffered a Recovery to be had against him, that that Recovery was good as it was at the Common Law, because the Statute doth not speak but that it shall not be a bar to him who hath the Reversion at the time of the Recovery, but this remainder was in Abeyance until the death of the Tenant for life; and that in the same Court it was adjudged accordingly in an Ejectione firmæ; and because the same was a discontinuance, the Plaintiff had here brought his Formedon in the Remainder; and therefore Lovelace prayed, That they might proceed without delays, (because the Plaintiffs Title appeareth) without Essoigns, and feigned delays: Which Dyer, Justice, conceived to be a reasonable request, and that it should be well so to do; because, as he said, This Court is debased and lessened, and the Kings Bench doth encrease with such Actions which should be sued here, for the speed which is there: And he said, That the delays here were a discredit to the Court; so as all Actions, almost, which do concern the Realty, are determined in the Kings Bench in Writs of Ejectione firmæ, where the Judgment is, Quod recuperet terminum, and by that they are put into possession; and

by such means, no Action is in effect brought here, but such Actions as cannot be brought there; as Formedons, Writs of Dower, &c. to the Slander of the Court, and to the Detriment and Loss of the Serjeants at the Bar. And Lovelace shewed, That divers mean Feoffments were made, &c.

LXXIV. *Mich. 15 Eliz.* In the Common Pleas.

Note: This Case was in Court: An Heir Female was in Ward of a common person, who tendered to her a marriage, viz. his younger Son; and she agreed to the Tender, and the Guardian died; The Heir married the younger Son according to the Tender: The Executors of the Guardian brought a Writ de Valore Maritagii, supposing the Tender by the Lord to be void by his death. But the Court was of a contrary Opinion, because the Tender of their Testator was executed.

Mich. 15 Eliz. In the Common Pleas.

LXXV. *Riches Case.*

ELizabeth Rich brought a Writ of Dower against J.S. who pleaded, and Judgment given for the Defendant, and afterwards the Judgment was reversed. And she brought a new Writ of Dower, and the Tenant pleaded, That he always was ready, and yet is, &c. Against which the Demandant pleaded the first Record to essop the Tenant. To which the Tenant pleaded, Nul tiel Record. It was the Opinion of the Court, That here the Demandant cannot conclude the Tenant by that Replication, to plead, Nul tiel Record; For the Judgment is reversed, and so no Record, and it cannot be certified a Record. But if the Tenant had taken Issue upon the plea of the Tenant absq; hoc, that he was ready; the same might well have been given in Evidence against the Tenant.

Note: That the Case was, That the Demandant after the death of her Husband entred into the Land in Demand, and continued the possession of it 5 years; and afterwards the Heir entred; upon which she brought Dower. It was agreed in that Case, That the Tenant needed not to plead, Tout temps prist. after his re-entry; for the time the Demandant had occupied the same, is a sufficient recompence for the Damages.

Mich.

Mich. 15 Eliz. In the Common Pleas.

LXXVI. *Vavasors Case.*

Nicholas Ellis, seised in Fee of the Mannor of Woodhall, Leased the same to William Vavasor, and E. his Wife, for the life of the Wife, the remainder to the right Heirs of the Husband; The Husband made a Feoffment in Fee to the use of himself and his Wife for their lives, the remainder to his right Heirs: The Husband died, the Wife held the Land, and did Waste in a Park, parcel of the Mannor: It was moved to the Court, If the Writ of Waste should suppose, that the Wife held ex dimissione Nicholas Ellis, or ex dimissione of her Husband: It was the Opinion of the Court, That upon this matter, the Writ should be general, viz: that she held de hereditate J.S. heredis, &c. without saying any more, either ex dimissione hujus, vel illius. For she is not in by the Lessor, nor by the Feoffers, but by the Statute of Uses; and therefore the Writ shall be ex hereditate: It was also the Opinion of the Justices, That the Wife here is not remitted, but that she should be in according to the Term of the Feoffment. Note in this Case, The Waste was assigned in destroying the Deer in the Park. And Meade, Serjeant, conceived, That Waste could not be assigned in the Deer, unless the Defendant had destroyed all the Deer: And of that Opinion also was Dyer. Manwood saith, If the Lessee of a Dove-house destroyed all the old Pigeons, but one or two couple, the same is Waste. And if a Keeper destroy so many of the Deer, so as the ground is become not Parkable, the same is Waste; although he doth not destroy them all. See 8 R. 2. Fitz. Waste 97. If there be sufficient left in a Park, Pond, &c. it is enough.

LXXVII. *Mich. 15 Eliz. In the Common Pleas.*

An Action upon the Case was brought against Executors; They were at Issue, Upon nothing in their hands: It was given in Evidence on the Plaintiffs part, That a stranger was bound to the Testator in 100 l. for performance of covenants; which were broken; For which the Executors brought Debt upon the Obligation, depending which Suit, both parties submitted themselves to the Arbitrament of A. and B. who awarded, That the Obligor should pay to the Executors 70 l. in full satisfaction, &c. and that the Executors should release, &c. which was done accordingly. And it was agreed by the Court, That by the Release, it shall be taken in Judgment of Law, That the Executors have Assets to the value of the whole 100 l. And although the Executors were compelled by the Award to make the release; yet it was their own act to submit themselves to the Arbitrament,

LXXVIII.

LXXVIII. Mich. 15 Eliz. In the Court of Wards.

NOte: It was Ruled by Kellaway and Wilbraham in the Court of Wards, That where the Kings Tenant of Lands holden by Knight service in Capite, made a Feoffment of the same Land to the use of himself for life, and after to the use of his younger Son in tail, the remainder to the right Heirs of the Feoffor, and died, the eldest Son within age, That the Queen should have the Wardship of his body, and of the third part of the Land; and when the eldest cometh at full age, the younger shall sue Liberty, and pay Primer Seisin according to the rate of the value of the whole Land, viz. of the third part, as in possession; and of the two parts as a Reversion: For the remainder to the right Heirs of the Feoffor, is in truth a Reversion. For the Fee simple was never out of him, because there was not any Consideration as to that; nor any use expressed. And also because that Liberty shall not be by parcels, the younger Son shall not be suffered to sue Liberty of the third part presently, and respite the residue as to the two parts in Reversion, until the Reversion fall, but shall sue Liberty presently, as well of the two parts in reversion, as of the third part in possession: And if the eldest Son had been of full age, at the time of the death of his Father, the younger Son should pay Primer Seisin as to the third part of the full value of it for one year as in possession; and as to the two other parts, the moiety of the value of a year as a Reversion. And at that time Breers Case was vouched; which was, Oliver Breers, Tenant in Chief by Knights Service, made a Feoffment in Fee to the use of himself for life, and after to the use of A. his Son and Heir for life, and after to the use of the first begotten Son of A. in tail, and after to the use of the second Son of A. &c. and for default of such Issue, to the right Heirs of the Feoffor: Oliver died, the said A. his Son being of full age: It was ruled by the said Council of the said Court of Wards, That he should pay for his Primer Seisin, a third part of the Land in possession, and two parts as a Reversion.

LXXIX. Mich. 15 Eliz. In the Common Pleas.

Post. 56.

The Case was; A Man was seised of a Pasture, in which was two great Groves, and a Wood, known by the name of a Wood; And also in the same Pasture were certain Hedge-Rows and Trees there growing Sparsum, Leased the same by Indenture for years. And by the same Indenture bargained and sold to the Lessee, all Woods and Underwoods in and upon the Premises: And further, That it should and might be lawful to the Lessee to cut down and carry away the same at all times during the Term. Harper, Justice, The Hedge-Rows did not pass by these words, Hedge-Rows sparsum. Dyer, The Hedge Rows shall pass, for the
the

the Grant is general, All Woods. Mounson, contrary; for the words of the Grant may be supplied by other words. It was moved further, If by these words, the Lessee may cut them oftner than once? And by Harper, Manwood, and Mounson, He can cut them but once. Dyer, contrary; And so it should be, if the words had been, Growing upon the Premises. And this word (Growing,) although it sounds in the present Tense, yet it shall be also taken in the future Tense, if the word (tunc) had not been alledged; for it is a word of restraint. The Case which was argued in the Chancery, 27 H. 8. where I was present, was such, The Prior of St. John of Jerusalem Leased a Commandry; Provided, That if the said Prior, or any of his Brethren there being Commanders, will dwell thereupon, then the said Lease to be void. It was doubted, If that did extend to the Successors, for the word (Being) is in the present Tense. And yet it was holden by Fitzherbert, That it should be taken in the future Tense, and so extend to the Successors: Otherwise, if the words had been (Nunc) Being.

LXXX. Mich. 15 Eliz. In the Common Pleas.

A Man seised of Lands in Fee, devised, That his Wife should take the profits of his Lands, until Mary his Daughter and Heir came to the age of 16 years; And if the said Mary died, That J.S. should be her Heir. Manwood, The Daughter after she hath attained the age of 16 years, shall have the Land in tail; for Devises ought to be construed according to the intent of the Devisee, so far forth as any certainty with reason may be collected, but no intent shall be taken against all reason and certainty. It is certain, That the Daughter shall not have the Land in Fee; for that shall descend to her without any Devise: And these words (If she dieth) cannot be intended a Condition; for it is certain she shall die. But if the words had been, That after the death of Mary, J.S. should be his Heir; in such case, Mary had had but an Estate for life, for there it is limited what Estate she should have. And when it is said, J.S. shall be his Heir, it shall be meant his Collateral Heir, so as the Estate tail remains in the Daughter. Mounson and Harper, to the contrary, and that she shall have but for life; And by Mounson, If Mary had been a stranger to the Devise, she should take nothing. And this Case was put by Barham, Serjeant, A Man deviseth 100 l. to his youngest Daughter, 100 l. to his middle Daughter, and another 100 l. to his eldest Daughter; and that all these sums shall be levied of the profits of his Lands. It was holden by the better Opinion of the Court in this Case, That the youngest Daughter should be first paid, and then the middle, and then the eldest Daughter; and that was said to be Coniers Case.

Len. 101.

LXXXI.

LXXXI. Mich. 15 Eliz. In the Common Pleas.

The Case was; The King granted to the Bishop of Salisbury, That he should have Catalla felonum & fugitivorum, and Fines and Amercements of all Tenants and Reliants within the Mannor of D. which Mannor, the Bishop Leased for years, and that the Lessee should have all profits and hereditaments within the same Mannor. Manwood, Justice, conceived, That the Lessee should have the Post Fines: For all things have a being somewhere, although they be not visible; As Rents, Fines, have their being in the Lands out of which they are issuing, and that is in the Soil, of a Fine levied of the Land within the Mannor, which is due by Land of him who ought to pay the Fine. And this Fine is due by reason of the Land, therefore it is in the Land, or within the Land; i. e. the Mannor. For the King may distrain for the Fine as well in the same Land, as in the Land of him who ought to pay it. Dyer doubted of it, and said, That the Bishop could not distrain in the Land for this Fine, but should have it by allowance in the Exchequer upon the Estretes; and if the party would not pay it, the Lessee should have a Subpoena against him out of the Exchequer. And some were of Opinion, That the Lessee could not have this Fine, for that they were not Hereditaments within the Mannor, but rather in the Exchequer, or Court where the Record is.

2 Len. 179.

4 Len. 234.

LXXXII. Mich. 15 Eliz. In the Common Pleas.

The Case was; A Man leased of a Pasture, in which are two great Groves, and a Wood, known by the name of a Wood; And also in the same Pasture there are certain Hedge-Rowes and Trees there growing Sparsum; Leased the same by Indenture for years: And by the same Indenture, bargained and sold to the Lessee, all Woods and Underwoods in and upon the Premises: And further, That it shall and may be lawful to the Lessee to cut down and carry away all the same at all times during the Term. Harper, The Hedge-Rowes do not pass by these words, for they are not known by the name of Woods, 14 H. 8. 2. contrary by Manwood, For by such words, Hedge-Rowes pass. Mounson, contrary; For the words of the Grant may be supplied by other Words. Dyer, The Hedge-Rowes shall pass, for the Grant is general, All Woods. It was moved further, If by those words, the Lessee might cut them a second time, or but once? Harper, Manwood, and Mounson, He may cut them but once. Dyer, contrary; And so it should be, if the words had been, Growing upon the Premises. And this word (Growing,) although it sounds in the present Sense, yet it shall be also taken in the future Sense, if not that the word (tunc) had been there; for that is a word of Restraint. The Case was argued in the Exchequer Chamber, where

I was present; which was, The Prior of St. John's, Leased a Commandry; Provided, That if the said Prior, or any of his Brethren there being Commanders, will dwell thereupon, then the said Lease to be void. It was doubted, If that Proviso did extend to the Successors; for the word, Being, is in the present Tense: And yet by the Opinion of Fitzherbert, it shall be taken in the future Tense, and so extend to the Successors; Otherwise, if the words had been, Now being.

LXXXIII. Mich. 13 Eliz. In the Common Pleas.

A. Wade B. his Executor, and died; B. to the intent to defraud the Creditors, refused to take upon him the Executorship; but caused a stranger to take upon him Letters of Administration; which stranger fraudulently gave the Goods of the Testator to B. Dyer, If the gift be fraudulent, then by the Statute of 13 Eliz. the gift is void; and then B. by the Occupation of the Goods, shall be charged as Executor of his own wrong. Manwood, I conceive there is a difference, If one makes an Executor, and another takes the Goods, but doth no Act which concerns the Office of an Executor, as paying of Debts; he is not Executor of his own wrong, but a Trespasser to him who is Executor in right: but if he doth any Act which belongs to the Office of an Executor, then he is Executor of his own wrong. Dyer, That Case hath been adjudged against you: and although the Books of 9 E. 4 & 22 H. 6. were vouched; Yet Judgment was given against the Opinion of Manwood. It was the Case of one Stoke.

Vid. le stat. 43
Eliz. cap. 8.
Office of Ex-
ecutors, 268;

Mich. 16 Eliz. In the Common Pleas.

LXXXIV. *Jackson and Darcyes Case.*

In a Writ de Partitione facienda, between Jackson and Darcye, the Case was; Tenant in tail, the remainder to the King, levied a Fine, had Issue, and died: In that case, It was adjudged; That the Issue was barred, and yet the remainder which was in the King was not discontinued; For by that Fine, an Estate in Fee simple determinable upon the Estate tail, did pass unto the Conuisee.

Hill. 17 Eliz. In the Common Pleas.

LXXXV. *Stowds Case.*

IN a Replevin, the Case was, That Lands holden of a Subject, came to the possession of the King by the Statute of 1 E. 6. of Chauntries, and the King granted the Lands over: In that case, It was holden, That the Grantee shall hold the Lands of the King according to the Patent, and not of the Ancient Lord: But the Patentee shall pay the Rent by which the said Land was before holden, as a Rent seck distrainable of Common Right to the Lord only and his Heirs; scil. to him of whom the said Lands were before holden.

Mich. 17 Eliz. In the Kings Bench.

LXXXVI. *Tresham and Robins Case.*

Tresham brought an Action of Debt upon a Recognizance against Robins; The Condition of which Recognizance was, To stand to the Arbitrament of A. and B. who made Award, That Robins should have the Land, Yielding and paying 10 l. per annum; And that Tresham in further assurance, should levy a Fine to Robins of the same Land, and upon that, Robins should grant and render to Tresham; which is done accordingly: the Rent is behind, Tresham brought Debt upon the Recognizance: The Defendant pleaded the special matter, with this perclose, Unde petit Judicium, if the Plaintiff should have Execution against him. And by the Opinion of the whole Court, the Conclusion of the Plea is not good; For here is not any Execution of the same Debt, but an Original Action of Debt brought; in which case, he ought to have concluded Judgment Si: Etio. It was further moved, If these words, Yielding and paying, make a Condition? And it was agreed, That the words do amount to as much as, So as he pay the Rent: And if a Man makes a Feoffment in Fee, Reddendo & salvendo 10 l. for years, the same is a Condition. But in the principal Case, It is not a Condition; For it is not knit to the Land by the Owner it self, but by a stranger; i.e. Arbitrator: but it is a good Clause to make the same an Article of the Arbitrament, which the parties are bound to perform, upon pain of forfeiture of the Recognizance: Which Wray concessit; And that this Rent should not cease by Eviction of the Land.

Hill. 18. Eliz. In the Common Pleas.

LXXXVII. The Earl of Westmerlands Case.

The Earl of Westmerland seised of a Mannor, whereof the Demesnes were usually let for three Lives by Copp, according to the Custom of the Mannor, granted a Rent-charge to Sir William Cordell, pro consilio impendendo, for the term of his Life, and afterwards conveyed the Mannor to Sir William Clifton in tail. The Rent is behind, Sir William Cordell dieth; Sir William Clifton dieth, the Mannor descended to Sir John Clifton; who granted a Copp-hold to Hempston; The Executors of Sir William Cordell distrain for the Rent: And it was agreed by the whole Court, That the Copp-holder should hold his Copp-hold charged. Vide inde, 10 Eliz. Dyer 276. Windham, It hath been adjudged, That the Wife of the Lord shall not be endowed against the Copp-holder, which Periam granted, and shewed a reason thereof; For the Title of Dower is not consummated before the death of the Husband, so as the Title of the Copp-holder was compleated before the Title of Dower; But the Title of the Grantee of the Rent is consummated before the Dower. Fenner conceived, That the Executors could not distrain upon the Possession of the Copp-holder; and he argued, That this Case is not within the Statute of 32 H. 8. For by the Preface of the said Statute, he conceived, That the Statute extended but to those Cases, for which by the Common Law, no remedy was provided; but in this Case the Executors by the Common Law might have had an Action of Debt, Ergo. But Periam and Windham held the contrary; For this Statute intends a further remedy for that mischief, viz. not only an Action of Debt, but also Distress and Abowry. See the words of the Statute, viz. distrain for the Arrearages, &c. Upon the Lands, &c. which were charged with the payment of such Rents, and chargeable to the distress of the Testator so long as the said Lands continue; remain, and be in the seisin or possession of the said Tenant in Demesne, who ought immediately to have paid the said Rent so being behind to the said Testator; or in the seisin or possession of any other person or persons claiming the said Lands only by and from the said Tenant by purchase, gift, or descent, in like manner and form as their Testator might or ought to have done in his life time. It was moved by Fenner, That here the Land charged, doth not continue in the seisin or possession of the Tenant; And here Sir J. Clifton was issue in tail, and therefore he doth not claim only by the Father, but per formam Doni, and therefore he is not lyable, Ergo, nor his Heir. Shuttleworth contrary, Sir J. Clifton was chargeable, and he claims only from them who immediately ought to have paid the Rent. And the Copp-holder claims by purchase from Sir J. Clifton, so he claims from Sir

2 Len. 152.
2 Brownl.
208.

William Clifton the Tenant, although he doth not claim immediately. For if the Tenant ought to have paid it, and he dieth, and the Land descendeth to his Heir, and the Heir maketh a Feoffment, the Feoffee shall be charged within this Statute; although he doth not claim immediately: So where Land discharged descends from the Tenant who ought to have paid it; and so from Heir to Heir. The Statute of 1 R. 2. is, That all Grants, &c. shall be good against the Donor, &c. his Heirs, &c. claiming the same only as Heirs to Cestuy que Use; Yet if Cestuy que Use grants a Rent-charge, and his Feoffees are disseised, the Grant shall be good against the Disseisor, and yet he doth not claim only by Cestuy que Use. And although Sir J. Clifton be Tenant in tail, and so claims per formam Doni, yet soasmuch as the Estate tail comes under the Estate of him who grants the Rent, he shall be subject to the charge: And this Statute extends not only to him who claims by the Tenant, but also to the Heir of him, &c. And by Windham, and Rhodes, The Coppyholder doth not claim only by the Lord, but he claims in also by the Custom; but the Custom is not any part of his Title, but only appoints the manner how he shall hold. The possession here is continued in Sir J. Clifton, for the possession of his Coppyholder is his possession; so as if the Coppyholder be ousted, Sir J. Clifton shall have an Assise; And so the strict words of the Statute are observed, for the seisin and possession continue in Sir J. Clifton, who claims only by Sir William Clifton, who was the Tenant in Demesne who ought to pay the Rent. But Fenner said to that, That the seisin and possession intended in the Statute, was the very actual possession, i.e. pedis dispositio, and such a possession in which a distress might be taken, and that could not be taken in a Freehold, without actual possession.

Hill. 18 Eliz. In the Common Pleas.

LXXXVIII. *Owen and Sadlers Case.*

10 Co. 56.

A Lease was made to A. for life, the remainder to B. in tail, the remainder to the right Heirs of B. who bargains and sells all his Estate, or levies a Fine with Proclamations of it to D. A. commits Waste: It was holden by the Court, That D. shall not punish him in an Action of Waste, for nothing passeth to him but during the life of the Grantor; scil. as to the remainder in tail, in respect of which Estate, the Action of Waste is only maintainable: for although that the Fee simple passeth to the Grantee, or Conuisee, yet in respect of that, an Action of Waste is not maintainable, until the Estate tail be spent.

LXXXIX.

LXXXIX. Mich. 18 Eliz. In the Common Pleas.

The King seized of a Manor, to which an Advowson is appendant; A stranger presents, and his Clerk is in by 6 months; The King grants the Manor with all Advowsons appendant to it, to B. The Incumbent dieth: In this case, It was holden by the Court, That the Grantee might present; For the Advowson was always appendant, and the Inheritance of the same passed to the Grantee; for it was not made disappendant by the Usurpation: But the Patentee shall not have a Quare Impedit of the first disturbance, for that presentment did not pass unto him, being a thing in Action, without mention of it in his Grant: And if the Plaintiff brings a Quare Impedit of the second Advowance, he shall make his Title by the presentment of the King, not making mention of the Usurpation; Yet if the Bishop present by Lapse in the case of a common person, he ought to make mention of it.

2 Cro. 53,
123.
Yel. 90, 91.
1 Cro. 240.
2 Roll. 371.
Hob. Rep.
242.

XC. Mich. 18 Eliz. In the Kings Bench.

In an Ejectione firmæ, upon an Evidence, the Case was this; The Bishop of Rochester, 4 E. 6. Leased to B. for years, rendering Rent; and afterwards granted the Reversion to C. for 99 years, rendering the ancient Rent; Habendum from the day of the Lease, without impeachment of Waste; which Grant was confirmed by the Dean and Chapter, but B. did not attorn. And in default of Attornment, It was holden by the whole Court, That the Lease was void: For it was made by way of grant of the Reversion, and to pass as a Reversion. But by Carline, If the Bishop had granted the Reversion, and also demised the Land for 99 years, It should pass as a Lease to begin first after the former Lease determined. And as to the Attornment, it was given in Evidence, That B. after the notice of the Grant to C. had speech with C. to have a new Lease from him, because he had in his Term but 8 years to come; but they could not agree upon the price. And it was the Opinion of the Justices, That the same was an Attornment, because he had admitted the said C. to have power to make to him a new Lease. Also the said B. being in Company with one R. and seeing the said C. coming towards him, said to the said R. See my Landlord, meaning the said C. Bromley, Solicitor, The same is no Attornment, being spoken to a Stranger. Barham, contrary; Because that C. was present. And it was holden to be a good Attornment: But if that Attornment was not before that the Bishop was translated to Winchester, the Lease should be void. And although the Confirmation of the Dean and Chapter was before the Attornment, so as no Estate was vested in C. yet it was good enough; For an assent of the Dean and Chapter is sufficient

cient, be it before or after; as it was holden by Catline, Southcote, and Whiddon. But Wray contrary.

Trin. 18 Eliz. In the Kings Bench.

XCI. *Norwich and Norwich's Case.*

HENRY NORWICH was bound by Obligation to Symon Norwich, upon Condition, To stand to the Award of J.S. who awarded, That the said Henry should pay to Symon 150 l. at such a day. And that the said Henry should find 3 Sureties to be bounden with him to the said Symon for the payment of another sum of Money to the said Symon. In Debt, upon this Obligation, Henry pleaded, As to the 150 l. payment; and as to the other point, That he was always ready to become bounden, &c. And as to the finding of Sureties, he demanded Judgment; for that, as to that, the Arbitrament is void. See 22 H. 6. 45. 17 E. 4. 5. 21 E. 4. 75. It was holden, That in such a case of such Award to find Sureties, the Defendant is not to find Sureties, but is only to tender his Obligation. And of that Opinion, was the whole Court, Because it was an Act to be done by a stranger to the Award. But if the Award had been of an Act to be done to a stranger, by him who was party to the Award, then the Award had been good: But if the stranger will not accept of the Money awarded, his Obligation is saved. So if the Award be, That one of the parties to the Award shall discontinue a Suit, which he hath against another; If the Court where the Action is depending, will not suffer the discontinuance of it, the Award is performed: And in the principal Case, It was ruled accordingly.

Note; The same day another Case was in the same Court, Between Dudley and Mallery: The Condition was, to perform an Award, &c. The Defendant pleaded performance of the Award. The Plaintiff assigned the breach of the Award in this, because the Award was, That the Servant of Mallery should pay to the Servant of Dudley 5 l. which the Defendant had not paid. It was the Opinion of the Court, That the Bond was not forfeited, for the Servants utriusq; are strangers to the Submission. But if the Award had been, That Mallery should pay to the Servant of Dudley 5 l. it had been good, for that Mallery is a party to the Submission, &c.

Hill. 19 Eliz. In the Kings Bench.

XCII. *Rivers and Pudsey's Case.*

John Rivers, Alderman of London, brought a Writ of Accompt against Pudsey; who said, That at the time, &c. and now, he is the Plaintiffs Apprentice; and demanded Judgment, &c. And it was holden by Wray, Justice, That it is no Plea: for although an Apprentice cannot be charged by this Action, for ordinary Receipts upon his Masters Trade; yet upon collateral Receipts, which do not concern the ordinary Trade of his Master, he shall be charged as well as another. See 8 E. 3. tit. Acc. 94. And, F.N.B. 119.

Hill. 19 Eliz. In the Kings Bench.

XCIII. *Potkins Case.*

In Debt upon an Obligation by Potkin; The Defendant pleaded, That he himself borrowed of one Watson a certain sum of Money, paying for the forbearance thereof excessive Usury; And that the Plaintiff was bound with the said Defendant to the said Watson, for the payment thereof; and that he himself by this Obligation upon which the Action is brought, was bound to the said Plaintiff to save him harmless against the said Watson, &c. And because that this Bond was a Counter-Bond for the payment of Excessive Usury, &c. And it was holden by Manwood, That the same was a good Bar; for here, the Plaintiff when he was impleaded upon the principal Bond, might have discharged himself upon this matter, and therefore his Laches shall turn to his prejudice; and therefore the Issue was joyned upon the excessive Usury.

Hill. 19 Eliz. In the Common Pleas.

XCIV. *Abrahall and Nurse's Case.*

John Abrahall brought a Writ of Right-Close against John Nurse, in the Court of George Earl of Shrewsbury, and made protestation to prosecute that Writ in the form and nature of the Writ of the Lady the Queen, of Assise of Novel disseisin, at the Common-Law, and made his Plaint accordingly. And afterwards the Assise was taken, who spake for the Plaintiff; Whereupon Abrahall had Judgment to recover. After which, Nurse brought a Writ of False Judgment, and assigned Error in this, That whereas the said Writ of Right-Close was directed to the Bailiffs of George Earl of Shrewsbury of his Manor, &c. that the said Bailiffs should do full Right, &c. that it appeareth by the Record, that the Plea was

holden before the Justices, and not before the Bailiffs of George Earl of Shrewsbury. For all the Precepts in the Plea aforesaid, are, Quod sint hic ad proximam Curiam coram Sectatoribus tenend. An other Error was in this, and false Judgment was given therein, because that the Roll is, Præceptum est Ministro Curie prædict. that he cause to come 12 Free and lawful Men, &c. videre illud tenementum, &c. & nomina eorum imbreviare, &c. and the Minister of the Court returned 12 Recognitors of the Añise aforesaid; whereas by the Law of the Land, 24 Recognitors in a Plea of Land ought to be returned. But notwithstanding that these Exceptions were taken; Yet upon due consideration of the Court, notwithstanding these Exceptions, the Judgment was affirmed. See the Record, Mich. 17 & 18 Eliz. Rot. 1301.

Hil. 15 Eliz. In the Common Pleas.

XCV. The Master and Scholars of *Linckfords Case.*

IN an Ejectione firmæ, the Case was; That the Master and Scholars of Linckford were seised of the Mannor of Haldesley in the Town of Laberhurst; which Town extended into the County of Sussex, and also in the County of Kent; and they made a Lease to one Clifford of all their Lands in the Town of Laberhurst, except the Mannor of Haldesley; whereas in truth they had not any Lands in the said Town, but the said Mannor: And the Ejectione firmæ was brought of that Mannor in Kent; and from thence the Visne came, and all the special matter aforesaid was found by Verdict: And Exception was taken to the Verdict, because they have found generally, That the Master and Scholars had not any thing in the said Town of Laberhurst, but the said Mannor: Whereas, they ought to have said, That they had not any thing in the said Town in the County of Kent: For they could not take notice what Lands the Master and Scholars had in that part of the Town which was in the County of Sussex. And of that Opinion the whole Court seemed to be. But Quære of it; for it was adjourned.

Mich. 19 Eliz. In the Common Pleas.

XCVI. *Hinde and Lyons Case.*

Post. 70.
Dyer 124.
2 Len. 11.

IN Debt by Hinde, against one as Son and Heir of Sir John Lyon, who pleaded, Nothing by descent, but the third part of the Mannor of D. The Plaintiff replied, Assets; and shewed for Assets, That the Defendant had the whole Mannor of D. by descent: Upon which they were at Issue. And it was given in Evidence to the Jury, That the said Mannor was holden by Knights-Service; And that the said Sir John the Ancestor of, &c. by his Will in writing

ting, Devised the whole Mannor to his Wife, until the Defendant his Son and Heir should come to the age of 24 years; And that at the age of his Son of 24 years, his Wife should have the third part of the said Mannor for her life, and his Son should have the residue: And if that his said Son do die before he come to his said age of 24 years without Heir of his body, that the Land should remain to J.S. the remainder over: The Devisor died, The Son came to the age of 24 years. The Question was, If the Son had an Estate in tail, for then for two parts he was not in by descent, And it seemed to Dyer and Manwood, That here was not any Estate in tail; for no tail shall rise, if not that the Son die before his said age, and therefore the tail shall never take effect: and the Fee-simple doth descend, and remain in the Son, unless that he dieth before the age of 24 years; and then the Estate vests with the remainder over: but now having attained to the said age, he hath the Fee, and that by descent of the entier Mannor, and then his Plea is false, That but the third part descended. And a general Judgment shall be given against him as of his own Debt; And an Elegit shall issue forth of the moiety of all his Lands, as well those which he hath by descent from his Ancestors, as his other Lands; And a Capias also lieth against him. But Manwood, Justice, conceived, That if a general Judgment be given against the Heir by default, in such cause, a Capias doth not lie, although it lieth in case of a false Plea. Dyer, contrary, And the Writ against the Heir is in the debet & detinet; which proves, That in Law it is his own Debt. And he said, That he could shew a Precedent, where such an Action was maintainable against the Executors of the Heir.

XCVII. *Mich. 19 Eliz. In the Common Pleas.*

The Case was; A. seised of Lands in Fee, by his Will in writing, granted a Rent-Charge of 5*l.* per annum out of the same to his younger Son, towards his education and bringing up in Learning: The Question was, If in pleading, the Devisee ought to aver, That he was brought up in Learning? And it was holden by Dyer, Manwood, and Mounson, Justices, That there needs no such Averment; for the Devise is not Conditional: and therefore although he be not brought up in Learning, yet he shall have the Rent: And the words of the Devise are, Towards his bringing up. And the Devisor well knew, that 5*l.* per annum, would not and could not reach to maintain a Scholar in Learning. Diet, Apparel, and Books. And this Rent, although it be not sufficient to such intent, yet the Son shall have it. And by Dyer, Three years past, such Case was in this Court, scil. Two were bounden to stand to the Award of certain persons; Who awarded, That the one of them should pay unto the other 20*s.* per annum during the Term of 6 years, towards the education and bringing up of

2 Len. 154.
Hob. 285.
Dyer 329.

such an Infant; and within two years of the said Term, the Infant died, so as now there needed not any supply towards his Education: Yet it was holden, That the said yearly sum ought to be paid for the whole Term after: For the words, Towards his Education, are but to shew the intent and consideration of the payment of that sum; and are not the words of a Condition.

XCVIII. Mich. 19 Eliz. In the Common Pleas.

IN a Quare Impedit; The Plaintiff declared, That the Defendant was seised in Fee of the Mannor of Orchard, alias Lydcots-Farm, to which the Advowson is appendant, and presented such a one, &c. And afterwards leased to the Plaintiff the said Mannor pernommen of the Mannor of Orchard, alias Lydcots-Farm, with the appurtenances for 21 years, and the Church became void, &c. And the truth of the Case was; That there is the Mannor of Orchard, and within the said Mannor, the said Farm called Lydcots Farm, parcel of the said Mannor, and the Lease was of the said Farm; and not of the said Mannor, and so the Advowson remained to the Lessor, as appendant to the Mannor: In this Case, It was moved, What thing the Defendant should traverse: Dyer, He shall say; That the Advowson is appendant to the Mannor of Orchard, absq; hoc, that it is appendant to the Farm of Lydcots: But it seemed to Manwood, That the Defendant shall say; That the Advowson is appendant to the Mannor of Orchard, and that the Farm of Lydcots, is parcel of the said Mannor, and that he leased to the Plaintiff the said Farm, with the appurtenances, absq; hoc, that the Mannor of Orchard, and the said Farm, are all one; For if he traverse the Appendancy to the Farm of Lydcots, then he confesseth, That the Mannor and Farm are all one, &c. But Dyer doubted of it.

Mich. 19 & 20 Eliz. In the Common Pleas.

XCIX. Kirlee and Lees Case.

IN Action upon the Case upon Assumpsit, the Plaintiff declared, That the Defendant in Consideration, that the Plaintiff would marry the Daughter of the Defendant, did promise to find to the Plaintiff and his said Wife convenient apparel, meat and drink for themselves and two servants, and Pasture also for two Geldings, by the space of 3 years, when the Plaintiff would require it: And further shewed, That Licet the Plaintiff had married the Defendants Daughter, and that he had required the Defendant to find, ut supra, &c. the Defendant refused, &c. The Defendant said, That he promised to find meat, drink, and apparel for the Plaintiff and his Wife for 3 years, absq; hoc, that he promised to find

find meat and drink for two servants, and Pasture for two Celdings: The Plaintiff Replicando, said, That the Defendant did promise to find, &c. for 3 years next following. Upon which they were at Issue, and found for the Plaintiff. It was moved in Arrest of Judgment, That here is no Issue joyned; For the Plaintiff hath declared upon a promise to find, &c. for 3 years, when the Plaintiff will that require. The Defendant hath pleaded a promise to find apparel, meat and drink for the Plaintiff and his Wife for 3 years, absq; hoe, that he promised for two servants, and two Celdings; and now the Plaintiff Replicando, saith, That the Defendant assumed for 3 years next following; so here is another Assumpsit in the Replication, than that whereof the Plaintiff declared, and so the Plaintiff hath not joyned Issue upon the Assumpsit traversed by the Defendant, and so there is no Issue joyned, for the Defendant denieth the Assumpsit whereof the Plaintiff hath declared. And the Plaintiff in his Replication hath affirmed another Assumpsit than that whereof he hath declared; and that is not helped by the Statute of Jeofails; for it is not a mis-joyning of Issue, but a not joyning of Issues; and that was holden by the Court, to be a material Exception. And the Lord Dyer conceived, That here is a Departure; for the Plaintiff in his Replication hath alledged another promise, than that whereof he declared. Another Exception was, Because that the Plaintiff had not averred in fact, that he had married the Daughter of the Defendant, but by an Argument Implicative (Licet;) but that Exception was disallowed; for that the word (Licet) is not a bare Implicative, but it is an express Averment; And so it was said, it had been ruled before. See 2 Mar. Plow. Com. 127, 128. *Buckley and Thomas Case.* Plow. 127.

C. Hill. 19 Eliz. In the Common Pleas.

A Lease for years was, upon Condition, That the Lessee should not grant over the Land at Will, or otherwise: He devised the same to his Executors, who accepted the same only as Executors, and not as Devisees: And yet it was the Opinion of the Justices, That the Condition was broken, Because he had done as much as lay in him, to have devised the Land. See 31 H. 8. 45. Dyer 45. 1 Roll. 214. 1 Len. 3.

Hill. 19 Eliz. In the Kings Bench.

Cl. Hodgson and Maynards Case.

Note: It was said by the Justices in this Case, That if an Executor promiseth to pay a Debt when he hath not Assets, no Action upon the Case lyeth against him upon such promise: but contrary, if he hath Assets. And so it was holden, That if the

2 Roll. 684.
1 Roll. 24.
9 Co. 94.
Stiles Rep.
304, 305,
405.
Hutton Rep.
27.
Clayton Rep.
85.
1 Len. 113.
1 Cro. 126.
Owen 94.

Heir hath nothing by descent, an Action upon the Case will not lie against him upon such a promise made.

CII. Mich. 20 Eliz. In the Kings Bench.

Co. 3 Inst. 1.
Stat. 5 Eliz.
2 Len. 12.

AN Action upon the Statute of 5 Eliz. of Perjury, was brought by three; and they declared, That the Defendant being examined upon his Oath before Commissioners, If a Surrender was made at such a Court of such a Manor of a Copphold, to the use of A. and B. Two of the Defendants swore, That no such Surrender was made, &c. Exception was taken to the Declaration, because that the certainty of the Copphold did not appear upon the Declaration: For the Statute is, That in that case the party grieved shall have remedy; so as it ought to appear in what thing he is grieved, Quod fuit concessum per totam Curiam. Another Exception was taken, because that the Action in such case is given to the party grieved. And it appeareth upon the Declaration, That the surrender in the Negative deposing, of which the perjury is assigned, was made to the use of two of the Plaintiffs only; and then the third person is not a party grieved; For he claims nothing by the surrender; and therefore, and because the two parties grieved have joyned with the third person not grieved, It was the Opinion of Wray and Southcote, Justices, That the Writ should abate.

CIII. Mich. 20 Eliz. In the Common Pleas.

1 Len. 263.

NOte: It was said by Dyer and Manwood, Justices, If one be condemned in an Action upon the Case of Trespass, upon Nihil dicit, or Demurrer, &c. And a Writ issueth to enquire of the Damages, and before the Return of the Writ, the Defendant dyeth; The Writ shall not abate for that; For the Awarding of the said Writ is a Judgment. And Manwood said; In a Writ of Accompt, the Defendant is awarded to Accompt. And the Defendant doth Accompt, and is found in arrearages, and dieth; The Writ shall not abate, but Judgment shall be given, That the Plaintiff shall recover, and the Executor shall be charged with the Arrearages; and yet Accompt doth not lie against them,

CIV. Mich. 20 Eliz. In the Common Pleas.

2 Len. 52.
2 Len. 282.
Post. 92.

IN an Action upon Escape, the Plaintiff is Nonsuit. It was holden by the Justices, That the Defendant in that case shall not have Costs, by the Statute of 23 H. 8. Note, The words in the Statute, upon any Action upon the Statute, (for any offence or wrong personal supposed to be done immediately to the Plaintiff) notwithstanding this Action is, Quodam modo an Action within the Statute; scil. by equity of the Statute of Westm. 2. which
give

gibe expressly against the Warden of the Fleet; Yet properly it is not an Action upon the Statute; for that in the Declaration in such Action, no mention is made of the Statute. Which, see the Book of Entries, 169, 171. And also here there is not supposed any immediate personal Offence, or Wrong to the Plaintiff: and an Action upon the Case, it is not, for then the Writ ought to make mention of the Escape, which it doth not here; And yet at the Common Law before the Statute of Westm. 2. An Action upon the Case lay upon an Escape; And so by the opinion of Dyer, Manwood, Mounson, Justices, Costs are not given in this case; and Manwood said; That upon Nonline in an Action upon the Statute of 8 H. 6. The Defendant shall not have Costs, for that the same is not a Personal Wrong, for the Writ is Disleisvrit, which is a real tort. 1 Len. 282.

CV. *Mich. 20 Eliz. In the Common Pleas.*

IN Debt upon an Obligation to perform certain Covenants, in a pair of Indentures; The Plaintiff assigned the breach in one of the Covenants; scil. That the Defendant should do all reparations of such a house demised to him; And that he had not repaired, but suffered the same to decay. To which the Defendant said, That the Plaintiff had acquitted and discharged him of the Reparations. Upon which the Plaintiff demurred in Law. Manwood, The same is an Acquittal and Discharge of the Reparations as well for the time past, as for the time to come, by force of the said Covenant, and amounts to as much as if he had Released the Covenant. And it was moved, If the Covenant being broken for want of Reparations, If now that Acquittal and Discharge, or Release of the Covenant, should take away the Action upon the Obligation which was once forfeited before? And it was the Opinion of Manwood, That it should not; for if one be bound in an Obligation for the performance of Covenants, and before the breach of any of them, the Obligor releases the Covenants, and afterwards one of the Covenants is broken, the Obligation is not forfeited, for there is not now any Covenant which may be broken, and therefore the Obligation is discharged: But if the Release had been after the Covenant broken, otherwise: all which, Dyer and Mounson Concefferunt.

CVL. *Mich. 20. Eliz. In the Common Pleas.*

Husband and Wife, seised in the right of his Wife of certain Customary Lands in Fee, he and his Wife by Licence of the Lord, make a Lease for years by Indenture reserving Rent, have Issue two Daughters: The Husband dieth; The Wife takes another Husband, and they have Issue a Son and a Daughter: The Husband and Wife die, The Son is admitted to the Reversion, and dieth

dieth without Issue. It was holden by Manwood, That this Reversion shall descend to all the Daughters, notwithstanding the half-blood; For the Estate for years which is made by Indenture by Licence of the Lord, is a Demise and Lease according to the Order of the Common Law; and according to the nature of the Demise, the possession shall be adjudged; which possession cannot be said, possession of the Coppholder; For his possession is Customary, and the other is meer contrary, therefore the possession of the one shall not be said the possession of the other; and therefore there is no possessio fratris in this Case: But if he had been Guardian by the Custom, or this Lease had been made by surrender, There the Sister of the half-blood should not inherit. And Meade said, That the Case of the Guardian had been so adjudged. Mounson to the same intent; And if the Copphold descend to the Son, he is not Coppholder before admittance; but he may take the profits, and punish Treasons, &c.

1 Len. 174.
175.

Hill. 20 Eliz. In the Common Pleas.

CVII. Hinde and Lyons Case.

2 Len. 11.
Dyer 124.
Ante 64.

DEbt by Hinde, against one as Son and Heir of Sir John Lyon, who pleaded, Nothing by descent, but the third part of the Mannor of D. The Plaintiff replied, Assets; And shewed for Assets, That the Defendant had the entire Mannor of B. by descent; Upon which they were at Issue; And it was given in Evidence to the Jury, That the Mannor was holden by Knights-Service, and that the said Sir John the Ancestor of the Defendant by his Will in writing devised the whole Mannor to his Wife, until the Defendant his Son and Heir should come to the age of 24 years; And that at the age of the Son of 24 years, his Wife should hold the third part of the said Mannor for the Term of her life, and his Son should have the residue: And if his Son do die before he come to the age of 24 years without Heir of his body, that the Land should remain over to J.S. the Remainder over to another. The Devisor died, the Son came to the age of 24 years: Dyer and Mounson, Justices, conceived, That here was not any Estate tail, and then for two parts he is not in by descent; For no Estate tail shall rise unless that the Son dieth before his said age, and therefore the Tail never took effect, and the Fee simple descends and remains in the Son, if not that he dieth before the age of 24 years, and then the whole vests with the Remainder over; but now having attained the said age, he hath a Fee, and that by descent of the whole Mannor; and then his Plea is false, that but the third part descended. And a general Judgment shall be given against him as of his own debt; And an Elegit shall issue forth of the moiety of all his Lands, as well those which he hath by descent from the same Ancestor, as of his other Lands; And a Capias Ieth also

also against him. But Manwood, Justice, conceived, That if a general Judgment be given against the Heir by default, in such case a Capias doth not lie, although in case of a false Plea it lieth: But Dyer held the contrary. And the Writ against the Heir is in the debet & detinet; which proves, That in Law it is his own Debt. And he said, That he could shew a President where such an Action was maintainable against the Executors of the Heir.

CVIII. *Hill. 20 Eliz.* In the Common Pleas.

A Seised of Lands in Fee, Devised them to his Wife for life; and after her decease, she to give the same to whom she will; had issue two Daughters, and died; The Wife granted the Reversion to a stranger, and committed Waste; And the two Daughters brought an Action of Waste: It was holden by The Justices, That by that Devise, the Wife had but an Estate for life, but she had gained authority to give the reversion by his Will to whom she pleased. And such a Grantee should be in by A. and his Will: For A. had given expressly to his Wife for life, and therefore by Implication she should not have any further Estate: But if an express Estate had not been appointed to the Wife; by the other words, an Estate in Fee-simple had passed. Latch 9, 39.

CIX. *Hill. 20 Eliz.* In the Common Pleas.

The Lessor Covenanted with his Lessee, That the Lessee should enjoy the Lands demised without any lawful Eviction; And afterwards upon a Suit depending in Chancery by a stranger against the Lessor for the Land demised; The Chancery made a Decree against the Lessor, and that the stranger should have the Land. It was moved, If that Decree were a lawful Eviction by which the Covenant was broken? It was holden by the Lord Dyer, That the same was not any Eviction; For although that in Conscience it be equum, that the said stranger have the possession; yet the same is not by reason of any right paramount the title of the Lessor; which was in the party for whom it was decreed.

Hill. 20 Eliz. In the Common Pleas.

CX. The Marquess of Northampton Case.

PArre, Marquess of Northampton, took to Wife the Lady Bouchier, the Heir of the Earl of Essex, who devised a fine of the Land of the said Lady, Sur Conusans de droit, &c. with a Grant and render to them for life, the Remainder to the right Heirs of the body of the Lady: And afterwards by Act of Parliament, 35 H.8. it was Enacted, That the said Lady should hold part of her 1 Roll. 430.

her Inheritance, and dispose of the same as a Feme sole, and that the Marques should have the Residue, and that he might Lease the same by himself without his Wife for 21 years or less, rendering the ancient Rent, being Land which had been usually demised, &c. The Marques Leased for 21 years, and afterwards durante Termino predict. Leased the same Land to another for 21 years, to begin after the determination of the first Lease. It was moved in this Case, That this last Lease was void, and that for 3 Causes;

1. Because the Marques had but an Estate for life, and then it could not be intended that the Statute did enable one who had but such an Estate determinable, to make such a Lease, which peradventure might not commence in his life-time.
2. The Letter of the Statute is, 21 years, or under; and the word (Under) strongly expounded the meaning of the Statute to be, not to extend to such an Estate; For here upon the matter is a Lease for 40 years.
3. Because the Land demised, is the Inheritance of the Wife: And in this Case it was said, That in the Case of one Heydon, such a private Act was strictly construed; which was, That it was Enacted, That all Copies for 3 Lives, granted by the Lord Admiral of the Lands of his Wife, should be good. The Admiral granted Leases in Reversion for 3 Lives: And it was holden, That that Grant was not warranted by the Statute. Dyer said, The words are general, Omnes dimissiones, and therefore not to be restrained unto special Leases; scil. to Leases in possession. Manwood said, A Feme Covert by duress, joyning in a Lease with her Husband, the same shall bind her.

Hill. 20 Eliz. In the Kings Bench.

CXI. The Queen and Sir John Constables Case.

3 Co.
Constables
Case.

A Quo Warranto was brought by the Queen against Sir John Constable, who claimed certain Wreck in the County of York; The Defendant pleaded, That Edward Duke of Buck. was seised of such a Mannor, to which he had Wreck appendant, and that he was de alta proditione debito modo attinctus, and that found before the Escheator; And shewed further, That the said Mannor descended to Queen Mary, who granted the same to the Earl of Westmerland, who granted the same to the Defendant: Upon which, It was demurred. And Exception was taken to the Plea, because the Attainder is not fully and certainly pleaded. It was argued by Plowden, That the Attainder was certainly pleaded, scil. debito modo attinctus; And it is shewed, That the Wreck is appendant to the Mannor, and then if the Defendant hath the Mannor, he hath the Wreck also; and if he hath the Mannor, it is not material as to the Queen how he hath it, for the Queen doth not claim the same, but impeacheth the Defendant for using there such a Liberty; But if the Heir of the said Duke had

had demanded the Hannon there against him, the Attainder ought to have been pleaded certainly. And it was said by him, That the Interest of the Queen in the Sea, extends unto the midst of the Sea betwixt England and Spain; But the Queen hath the whole Jurisdiction of the Sea between England and France, because she is Queen of England, France, &c. And so it is of Ireland.

CXII. *Hill. 20 Eliz.* In the Common Pleas.

Tenant for life made a Feoffment of White-Acre, of which he was seised for life, and made a Letter of Attorney to deliver Livery and Seisin secundum formam Chartæ; before Livery, the Tenant purchased the fee; and afterwards Livery was made: It was resolved by the Court in this Case, That all passed: But if the feoffment had been of all his Lands in D. and the Letter of Attorney accordingly; and before Livery made, the feoffee had many Lands there; If he purchased one Acre after, the Livery should not extend to that Acre, because the Authority was satisfied by the other Acre.

Mich. 21 Eliz. In the Kings Bench:

CXIII. *Banks and Thwaits Case.*

In an Action upon the Case, the Case was, That A. had pawned an Indenture of Lease for years, of a Messuage and Lands to Banks; Thwaits, intending to purchase the same, required Banks to deliver him the said Lease, and he would give Banks 10 l. whether he bought it or no, at what time he would request the 10 l. And Banks delivered the same to Thwaits accordingly. And afterwards brought an Action upon the Case, and declared upon the whole matter; and concluded, *Licet sapius requisitus, &c.* without alledging a request express in certain, and the day and place of it. It was said by Cook, That here the monies did not grow due before Request, nor is payable before Request, and therefore a Request ought to be made in fact; And so, he said, It was ruled in this Court, in an Action upon the Case, betwixt Palmer and Burroughs; and he said, that the Money was not due by the Promise, but by the Request. And it was the Opinion of the whole Court, That although it be a duty, Yet it is not a duty payable before Request; And the Request makes a Title to the Action: But if A. selleth to B. a Horse for 10 l. there is a Contract, and a Request in fact, need not be layed. And the Opinion of the Court was also, That upon this matter the Plaintiff could not have an Action of Debt; for there is not any Contract, for the thing is not sold, but it is a Collateral promise grounded upon the delivery: And by Clench, Here the Request is traversable: And afterwards Judgment was given against the Plaintiff. And it was said, It was so ruled in Alderman Pullisons Case, in the Exchequer.

Post. 200.

Post. 201.

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Mich.

Mich. 21 Eliz. In the Common Pleas.

CXIV. Segar and Boyntons Case.

2 Len. 156.

IN Trespass, the Case was this; King Henry the 8th, Anno 27 of his Reign, gave the Mannor of D. to Sir Edward Boynton, Knight, and to the Heirs Males of his body; Sir Edward Boynton had Issue Andrew his eldest Son, and C. the Defendant his younger Son, and died: Andrew Boynton Covenanted by Indenture with the Lord Seymore, that the said Andrew Boynton would assure the said Mannor to the use of himself for life, the Remainder to the said Lord and his Heirs: The said Lord Seymore in recompence thereof, should assure other Lands to the use of himself for life, the remainder to the use of the said Andrew Boynton in tail; who 37 H. 8. levied a Fine of the said Mannor without proclamations to two strangers, to the uses according to the said Agreement; and before any Assurance made by the said Lord, The said Lord was Attainted of Treason, and all his Lands were forfeited to the King: And afterwards the said Andrew Boynton made a Suggestion to Queen Mary, of the whole matter; and upon his humble Petition, the said Queen by her Letters Patents reciting the said Mischiefs, &c. et premissa considerans, et anuens Petitioni illius, granted to him the Mannor aforesaid; and further de ampliori gratia sua, Released to the said Andrew Boynton all her Right, Possession, &c. which came to her ratione attinctura prædictæ, vel in manibus nostris existant, vel existere deberent: After which, viz. 5 Eliz. Andrew Boynton levied a Fine to the Plaintiff with proclamations, and died without Issue. And, the Defendant as Issue in tail entered, Puckering, Serjeant; It is to see, 1. If by the words of the Letters Patents of Queen Mary, viz. de ampliori sua gratia, &c. the Reversion in Fee which the Queen had, passed or not. 2. Admitting that the Reversion did not pass, Then if the Fine levied by Andrew Boynton, 5 Eliz. to the Plaintiff, the Reversion being in the Queen, be a Bar to the Issue; For when the first Fine was levied 37 H. 8. which was levied without proclamations, the same shall not bind the Issue in tail, neither as to the Right, nor to the Entry, for it is not any Discontinuance, because the Reversion is in the King, as of things which lie in Discontinuance, Rent, Common, &c. For such Fine is a Fine at the Common Law, and not within the Statute of 4 H. 7. And such a Fine is void against the Issue: But if such a Fine without proclamations be levied of a thing which lieth in Discontinuance, then such a Fine is not void, but voidable by a Formedon: And therefore this Fine, in the Case at Bar, being levied without proclamations of Lands entailed, whereof the Reversion is in the King at the time of the Fine levied, shall not bind the Issue; And by such Fine the Conusee hath Fee,

which Fee was forfeited to the Queen by the Attainder of the Lord Seymore, and that the Queen immediately restored to Andrew Boynton, because the Lord Seymore had not according to Agreement betwixt them, assured his Lands to the said Andrew Boynton in Recompence; For the Indentures themselves were not sufficient to raise any use. See acc. 1 Mar. Dyer, 96. As to the point he conceived, That nothing passed of the Reversion, For the Grant hath reference to the words, All his Right, Possession, &c. which came to her, *ratione attinctura*, and all the residue of the Grant, ought to have reference to that, to the *ratione attinctura* prædict. which was the foundation of the whole grant; And here the intent of the Queen was not to other intent, but only to restore Andrew Boynton to the said Mannor, and to his ancient Estate in it; And nothing appears in the said Letters Patents by which it might appear, that the Queen was appaised of her Reversion which she had by descent, and therefore the same cannot pass by general words: If the King grants the Goods and Chattels of all those who have done any Trespass for which *vitam amittere debent*, The Goods of him who is Attainted of Treason, shall not be forfeited or granted by such general words: 8 H. 4. 2. The King grants *omnia catalla Tenentium suorum qualitercunque; damnatorum*, the same doth not extend to the Goods of him who is condemned for Treason. See 22 Aff. 49. So in our Case, the Patent shall not serve to two Intents, and not to pass two Interests by these general words; and then nothing passeth but the Fee determinable which was conveyed to the Lord Seymore, and forfeited by the Attainder. Then it is to be considered, How after the said Grant, the said Andrew Seymore is seised; And he conceived, That he should be in of the said Fee determinable, and not of an Estate in tail, against his own Fine; and then if he be not seised by force of the Tail at the time of the Fine levied, 5 Eliz. the same Fine cannot bind the entail: But admitting, That at the time of the second Fine levied, that he was in of an Estate in tail, yet that Fine shall not bar the Issue; For first, This Fine cannot make any Discontinuance, because that the Reversion in Fee is in the King, which is not touched by the Fine. See the Case of Saunders, Where A. makes a Lease for years, to begin at a day to come, and afterwards levies a Fine to a stranger with proclamations, and the 5 years pass, and afterwards at the day of the beginning of the said Lease, the Lessee enters; his Entry is lawful, and he shall not be bounden by the Nonclaim; and so it was adjudged in Saunders and Starkies Case. Vide inde *Saffins* Case, 3 Jac. Cook 5 Part, 123, 124. After the making of the Statute of 4 H. 7. of Fines, It was much doubted, If the Issues of Common Tenants in tail should be bound by a Fine with proclamations, because upon the death of their Ancestors, they are as new Purchasers per formam Doni. And therefore it was provided by 32 H. 8. That the said Statute of 4 H. 7. should extend to such Common entails; but there was

Vid. Roll. :
Tit. Prærogat

no doubt of an Estate tail of the gift of the King. And see Mich. 15 & 16 Eliz. Rot. 1474. between Jackson and Darcy, in a Partitione facienda, the Case was, Tenant in tail, the remainder to the King, after the Statute of 32 H. 8. levied a Fine with proclamations, and it was adjudged, That the same should bind the Issues; The Act of 32 H. 8. doth not extend but where the Reversion is in the King, but no mention is there of a Remainder, because that the words of the said Act are general of all Tenants in tail; The makers of the Act perceiving, That it might be doubted, that the generality of the words might include all Estates tails of the gift of the King, they restrained the words in a special manner; as appeareth by the last Proviso of the same Act, For to any Fines heretofore levied or hereafter to be levied by any person or persons of any Mannors, &c. before the levying of the said Fine, given, granted or assigned to the person or persons levying the said Fine, or to any of his or their Ancestors in tail by Letters Patents, or Act of Parliament, the Reversion whereof at the time of the levying of such Fine was in the King: And so such Estates are excepted, And that in such Cases, where such Fines are levied, they shall be of such force as they should be if the said Act had not been made. And therefore it seemed to the said Parliament, That such Estate tails of the gift of the King were not bounden by the Statute of 4 H. 7. for otherwise, the said Proviso or Exception had been frivolous. Walmesley, Serjeant, to the contrary; And he agreed, That the first Fine was not any Discontinuance; and yet he conceived it is not altogether void against the Issues before that they entered; For no right remains in the Conusor against his Fine: And also he conceived, That this Clause, ex uberiori gratia, did extend to pass more than passed before; For he conceived, That the Queen intended more liberally, viz. the Reversion; For this is not any matter of Prerogative, but the same is a matter of Interest, which might also in the Kings Case pass out of the King by general words. See 3 H. 7. 6 & 7 Br. Patents, 48. A Grant of the King ex insinuatione, doth not hinder the force of the words, ex mero motu. And it was the Opinion of the whole Court, That the Reversion which was in the King did not pass by that Grant; For the whole scope of the Patent was, as he conceived, to grant only that which the King had then ratione attinere. Anderson conceived the Patent insufficient, because the Petition was not full and certain; Also he said, That ex speciali gratia, &c. would not help this Case; For the Estate tail is not recited, but only that he was seised de Statu hereditario, &c. so the Queen was deceived, &c. Periam contrary, The Queen was advised of the Michief, and granted such Estate with which he parted by the Fine. And as to the other Point, Walmesley conceived, That the Fine with proclamations should bind the tail: And as to the Objection which hath been made, That the Conusor at the time of the Fine levied, was not seised by force of the entail; The same had been a good

good matter to have alledged to avoid a Common Recovery in the Tenant to the Præcipe, but not to this purpose: For if there be Tenant in tail, and he levie a fine, although he was not seised at the time of the fine levied by force of the entail, yet such a fine shall bind the issue; So if Tenant in tail discontinueth, and disseiseth the Discontinuee, and so levies a fine. And he conceived, That the issue in tail is bound by the Statute of 4 H. 7. even of the Gift of the King. See 19 H. 8. 6 & 7. Where it is holden; That the Issue in tail is bound by the Statute of 4 H. 7. And where it hath been Objected, That it doth not extend but to such fines which make Continuance at the Common Law, The same is not so: For if Tenant in tail of a Rent, or Common, levies a fine with proclamations, it is clear, that the issues shall be barred by it. And he much relied upon 29 H. 8. Dyer, 32. Tenant in tail of the Gift of the King levies a fine, or suffereth a Common Recovery, although it be not a Continuance, because that the Reversion is in the King; yet it is a bar unto the Issue. But Note, That that was before the Statute of 34 H. 8. See *Wiseman's Case*, 27 Eliz. Cook 2 Part. And see the *Lord Staffords Case*, 7 Jac. Cook 8 Part, 78.

C X V. Mich. 21 Eliz. In the Common Pleas.

A Man seised of Lands called Hayes, which extended into two Cotons, A. and B. Devised Hayes Land in A. to his Wife for life, and after to his Son; and if the Son die without issue, then Hayes Land shall remain to his 3 Daughters, &c. The Son died without issue: It was the Opinion of Anderson and Periam, Justices, That all Hayes Land should not pass by the said Devise, but only that which was in A. 3 Cro. 674.
2 Cro. 21, 22

Mich. 21 Eliz. In the Common Pleas.

C X V I. Henry and Brode's Case.

In an Action of Trespass, the Plaintiff declared, That the Defendant simul cum J.S. and another Clausum suum fregit; And Exception was taken to it, because here it appeareth upon the Plaintiffs own shewing, That the Trespass whereof, &c. was made by the Defendant and another; and therefore the Writ brought against Brode only, was not good. But if it had been simul cum aliis ignotis personis, It had been good enough. But here the Plaintiff hath confessed another person trespassor with the Defendant. See 2 H. 7. 15. 8 H. 5. 5. 14 H. 4. 22. Yet afterwards in the principal Case, Judgment was given for the Plaintiff. 1 Lem. 41.

Mich.

Mich. 21 Eliz. In the Common Pleas.

CXVII. Barker and Taylors Case.

3 Co. Sir
George
Brown's Case

The Case was; A Woman Tenant in tail within the Statute of 11 H. 7. accepted a Fine Sur Conusans de droit come ceo, &c. and by the same Fine rendered the Land to the Conusor for 1000 years: It was moved, If this Conveyance and Disposition was within the penalty of the Statute: For the Statute speaks of Discontinuances, &c. And it was the clear Opinion of the Court, That the same is within the Statute, for by such practice, the meaning of the Statute might be defeated: And if such Render for a 100 years should be good, by the same reason for 1000 years, which is as great a mischief and as dangerous to those in Reversion, as Discontinuances. And by Rhodes, Justice, It hath been adjudged, That if a Woman who hath title of Dowry, if before she be endowed, she will enter and levy a Fine, the same is within the said Statute, and yet she is not Tenant in Dowry. See 5 Mar. Dyer 148. Penicocks Case. And 36 Eliz. Cook 5 Part. Sir George Brown's Case.

CXVIII. Mich. 21 Eliz. In the Kings Bench.

2 Len. 221.
Ante 9.

A. By his last Will, willed, That his Lands should descend to his Son; but willed, That his Wife should take the profits thereof until the full age of his said Son of 21 years to maintain, and bring him up, and died; The Wife took Husband, and died, during the nonage of the Son: It was the opinion of Wray and Southcote, Justices, That the second Husband should not have the profits until, &c. For nothing is devised to the Wife but a Confidence; and she is as a Guardian or Bailiff, to aid the Infant, which by her death is determined, and cannot accrue to the Husband; But if the Husband had devised the profits of the Land to the Wife, until the age of the Infant, for to bring up and educate, Ut supra. Wray said, The same amounted to a devise of the Land and so a Chattel in the Wife, which should accrue to the Husband.

Mich. 24 Eliz. In the Common Pleas.

CXIX. Stamps Case.

The Case was: John Stampe being possessed of a Term for years granted the same to Thomas Stampe his Brother 12 May 20 Eliz. And afterwards, 8 Octob. 21 Eliz. he himself being in possession of it, Mortgaged the same to one P. who suffered him to continue his possession: Thomas Stampe granted his Estate

Estate to John Stampe, who mortgaged the same to one G. who suffered the said John Stampe to continue in possession until 10 December, 22 Eliz. G. entred, John Stampe came to the said P. and requested him, that he would grant all his Estate to B. and C. to whom the said John Stampe was indebted for security of their Monies; To whom the said P. said, That if he would find him any other surety for his Debt, he is contented so to do. And John Stampe offered to the said P. the said B. and C. and he accepted the same, and at the request of the said John Stampe, granted his Interest to them 2 Feb. 22 Eliz. P. having notice of the Grant before made to the said G. Upon which G. enforced against P. upon the Statute of 32 H. 8. It was holden in this Case by Periam and Meade, Justices, That P. was not within the penalty of the Statute: For P. granted his Interest to B. and C. at the suit and at the request of John Stampe, who was the Mortgager, for assurance of his Debt which he ought to them; And therefore it shall not be intended, that that Grant was made for any maintenance, or for any unlawful cause against the Statute. And also John Stampe who granted unto P. had possession, and received the Issues and Profits of the said Lands for a whole year before the Grant, notwithstanding that he was not in possession by a whole year next before the day of the date of the Grant. As if a Man be in possession, or hath received the Issues and Profits for a whole year, and afterwards a stranger enters upon him, and hath the possession for the space of a Quarter of a year, or half a year; yet he who was in possession by a year before, may grant his Interest without danger of the Statute, &c.

Godb. 450.

CXX. *Pasch. 24 Eliz. In the Kings Bench.*

NOte: Per totam Curiam; A Man made his Will in this manner; scil. I Will and Bequeath my Land to A. And the name of the Devisor is not in the whole Will; Yet the Devise is good enough by Averment of the name of the Devisor. And for proof that the same is his Will, If one lying in extremis having an intent to devise his Lands by Will, makes such devise, but doth not command the same to be put in writing, but another without the knowledge or Commandment of the Devisor, putteth it in writing in the life-time of the Devisor, the same is a good Devise; For it is sufficient, if the Devise be reduced into writing during the life of the Devisor.

2 Len. 37.

Pasch.

Pasch. 25 Eliz. In the Common Pleas.

CXXI. Pepy's Case.

WAsse was brought by F. and his Wife against Pepy ; and declared, That the said Pepy was seised, and enfeoffed certain persons to the use of himself for life, and afterwards to the use of the Wife of the Plaintiff, and her Heirs : The Defendant pleaded, That the said Feoffment was to the use of himself and his Heirs in Fee, &c. absque hoc, that it was to the uses, as in the Count ; Upon which they were at Issue : And it was found by Verdict, That the said Feoffment was to the uses contained in the Count ; but further found, That the Estate of the Defendant by the Limitation of the use was privileged with the impunity of Waste ; scil. without Impeachment of Waste. It was moved, If upon that Verdict, The Plaintiff should have Judgment. Anderson and Rhodes, Justices, conceived, That he should, for that the matter in Issue is found for the Plaintiff ; and that is, the Feoffment to uses contained in the Count, and this impunity of Waste is a Foreign matter not within the Charge of the Jury ; and therefore the finding of the same is but matter of Surplusage : As if I plead a Feoffment of J.S. to which the other pleads, That he did not enfeoff, and the Jury find a Conditional Feoffment, the Court shall not respect the finding of the Condition, for it was not in Issue, and no advantage shall be ever had of such a Liberty if it be not pleaded, 30 H. 8. Dyer 41. In Dower, the Tenant pleaded, Ne unq; seisi que Dower, &c. The Tenant pleaded, That before the Coverture of the Demandant, one A. was seised, and gave the Land whereof Dower is demanded to the Husband of the Demandant in tail, who made a Feoffment ; A stranger took the Demandant to Wife, took back an Estate in Fee, and died seised, having Issue heritable : Now although upon the truth of the matter she is not Dowerable de jure, yet so far as the parties were at Issue upon a point certain, no foreign, nor strange matter not in Question betwixt the parties shall be respected in the point of Judgment : But if the Defendant had pleaded it in Bar, he might have foreclosed the Demandant of her Dower. See 38 Ass. 27. 47 E. 19. In a Præcipe quod reddat upon the default of the Tenant, came one and shewed, How that the Tenant who made default, was but Tenant for life of the Lands in demand, the Reversion in Fee to himself, and prayed to be received : The Demandant counterpleaded the Rescise, Dicendo, That the Tenant had Fee, &c. Upon which, Issue was taken : And it was found, That neither the Tenant, nor he who prayed to be received, had any thing in the Land. And in that Case, The Court did not regard the matter which was superfluous in the Verdict ; For they

they were at Issue upon a point certain; *scil.* whether the Tenant was seised in Fee: For it is confessed of the one side, and of the other, that he had an Estate for life, and of that matter the Jury was not charged, and they are not to enquire of that; And so it is found against the Demandant, by which the Resceit was granted. See 7 H. 6. 20. The parties were at Issue upon a Dying seised; which is found by Verdict; but the Jury find further, That the other party made continual Claim: The said continual Claim shall not be respected in point of Judgment, because it was not pleaded in Avoidance of the Disceit, &c. Windham, Justice, to the contrary, because it appeareth to us upon the Verdict, That the Plaintiff hath not cause of Action, and therefore he shall not have Judgment: As in Detinue, the Plaintiff declares upon a Bayment by his own hands; The Defendant pleads, Ne Detinue pas, the Jury find the Detinue but upon Bayment by another hand: In that case notwithstanding that the Detinue be found; yet the Plaintiff shall not have Judgment. But Anderson, Rhodes, and Periam conceived, That in the principal Case Judgment should be given for the Plaintiff: For in no case the party shall have advantage of that liberty of impunity of Waste, if he doth not plead it; And the Jurors are not to meddle with any matter which is not in issue; and if they do, It is but matter of surplage, and to no purpose; and afterwards Judgment was given for the Plaintiff. See the Number Roll, *Pasch.* 25 *Eliz.* Rot. 602.

Pasch. 20 *Eliz.* In the Common Pleas.

CXXII. *Skipwith's Case.*

IN an Action of Trespass: It was found by a special Verdict; *Godbolt* 14, 143. *Co. of Copy-holds* 94. That the Lands were Copp-hold Lands. That the Custom of the Mannor was, That Quelibet Femina Viro Co-operta poterit devise Lands, of which she was seised of an Estate of Inheritance in Fee simple according to the Custom to her Husband; And also Surrender the same in the presence of the Steward and 6 other of the Tenants. And it was further found, That one J.S. was seised of the Copp-hold Lands, wherein the Trespass was; And that he had Issue 2 Daughters and died seised of the said Lands: And that after his Decease his two Daughters entered into the said Lands, and afterwards, they both took Husbands; And that afterwards, one of the said Daughters made a Will in writing, and by her said Will, in the presence of the Steward, and six of the Tenants, she Devised her part of the said Copp-hold Lands to her Husband and his Heirs; and at the next Court, surrendered the said Copp-hold Lands in the presence of the Steward and six other of the Tenants, to the uses in her Will expressed, and shortly after she died; and that after her death,

her Husband was admitted to the said part of her Lands: who continued the possession thereof; And the Husband of the other Daughter and his Wife entered upon him: Upon whom, he re-entered; And the Husband brought Trespass. This Case was argued at the Bar, by Rhodes: And he said, That the Custom was not good; neither for the Devise, nor for the Surrender. First, for the incertainty of the Estate, what Estate she might Devise, for that is not expressed in the Custom; but generally that she might Devise her Copyhold Lands of Inheritance, without expressing for what Estate. And secondly, the Custom is not good; for that it is against reason, that the Wife should surrender to the use of her Husband; And that a Custom to devise is not good where it is incertain, he vouched many Cases; As 13 E. 3. tit. Dum fuit infra statum. 3. The Tenant said, That the Lands lay in the County of Dorset, where the Custom is, That an Infant might make a Grant or a Feoffment when he could number 12 d. and because it is incertain when he could do it, It was holden to be a void Custom. So 19 E. 2. tit. Gard. 127. In a Ravishment of Ward, It was alledged, that the Custom was, That when an Infant could measure an Ell of Cloath, or number 12 d. that he should be out of Ward; And it was holden to be a void Custom for the incertainty: Also he said, That in the principal Case, the Custom was void; for that it was against reason, that the Wife should surrender to her Husband; for every Surrender is a Gift: and a Woman cannot give unto her Husband; for the Wife hath not any disposing Will, but the Will of her Husband only. And therefore the Case is in 21 E. 3. That if the Husband be seised of Lands in the right of his Wife; and he maketh a Feoffment in Fee of the Lands, and the Wife being upon the Lands doth disagree, and saith, She will not depart with the Land during her life; yet the Feoffment is a good Feoffment, and shall bind the Wife during the life of the Husband. And see 3 E. 3. Br. tit. Devise, 43. That a Feme Covert cannot Devise to her Husband, for that should be the Act of the Husband to convey the Lands to himself. And whereas the Case in 29 E. 3. was Objected against him, where the Case was, That a Woman being seised of Land deviseable, took a Husband, and had Issue by him; and the Wife Devised her Lands to her Husband for his life, and died; and a Writ of Waste was afterwards brought against him: And it was there holden, That the Writ did lie. He said, That that Case did make rather for him than against him, for that Case proves, that the Husband did not take the Land by vertue of the Devise in his own right; but that he held the Lands having Issue by the Wife as Tenant by the Courtesie, and so under another Title; and therefore it appeareth, that the Writ of Waste was there brought against him as Tenant by the Courtesie. Also he said, That the Devise was void by the Statute of 34 H. 8. Cap. 5. where it is Enacted, That Wills and Testaments made of any Lands, Tenements, &c.

by

by Women Coverts shall not be good or effectual in the Law; and he said, That that Statute did extend to Copyhold Lands: But as to that, all the Justices did agree, That Copyhold Lands were not within the words of that Statute. But Anderson said, That the Equity of that Act did extend to Copyholds: And further Anderson said, That the Prescription, or Custom in the principal Case was not good; for it is layed to be, That Qualibet Fœmina Viro Co-operta poterit, and it ought to be potest; and by the Custom have used to Devise to the Husband; And a Prescription must be in a thing done, and not in posse. Also he said, That the Custom if it were good, is not well pursued; For the Custom is, that the may Devise and Surrender in the presence of the Steward, and six Tenants, and that must be intended to be done all at one time; for the words of a Custom are to be per-
formed, if it may be: but in the principal case, the Devise is laid to be at one time, and the Surrender at another time, and so it is not in pursuance of the Custom: But to that it was not answered. But then it was said, Admit that the Custom to devise, and the Devise were not good; yet the Action did not lie against the Defendant, because that the Husband was admittet, and his Entry into the Land was countenanced by a lawful Ceremony; and also he was Tenant in Common with the other Husband by such Entry. It was adjourned.

Mich. 26 Eliz. In the Kings Bench.

CXXIII. Roffe's Case.

IN Trespafs brought by Roffe, for breaking of his Close, and beating of his Servant, and carrying away of his Goods: Upon Not guilty pleaded, the Jury found this special matter; scil. That Sir Thomas Bromley, Chancellor of England, was seised of the Land where, &c. and leased the same to the Plaintiff and one A. which A. assigned his moiety to Cavendish; by whose Commandment the Defendant entred. It was moved, That that Tenancy in Common betwixt the Plaintiff, and him in whose right the Defendant justified, could not be given in Evidence; and so it could not be found by Verdict, but it ought to have been pleaded at the beginning. But the whole Court were clear of another Opinion; and that the same might be given in Evidence well enough. It was further moved against the Verdict, That the same did not extend to all the points in the Declaration, but only to the breaking of the Close, without enquiry of the battery, &c. And for that cause, it was clearly holden by the Court, That the Verdict was void; And a Venire facias de novo was awarded.

Post. 94.

Mich. 25 & 26 Eliz. Rot. 479. In the Kings Bench.

CXXIV. *Absolon and Andertons Case.*

William Absolon Master of the Savoy, and the Chaplains there, brought Debt against Andertons. The Case was, That the said Master and Chaplains leased Lands to the Defendant for certain years; and afterwards he accepted of them an Indenture of Bargain and Sale to him and his Heirs, by express words of Bargain and Sale, without other words; And one of the Masters of the Chancery within the 6 months came unto them into their Chapter-house, and before him they acknowledged the said Indenture to be their Deed, and prayed that it be enrolled; which was done accordingly. It was moved, If that acknowledgment and Enrollment were good or not; or if the Master and the Chaplains ought to have appointed one by their Warrant, to be their Attorney, to acknowledge the said Deed? And it was also moved, If there needed any Enrollment at all of it, because Anderton had then an Interest in the Land for years; in which case it is to be considered, If the words *Bargainizavi & Vendidi*, shall be of such effect, as the words *Dedi & Concessi*? And it was said by the Court, That a Warrant of Attorney to acknowledge a Deed were a strange thing. And it was agreed, That the Indenture being once Inrolled, it was not material by what means it was Inrolled; but was good being done.

1 Len. 184.

Mich. 26 Eliz. In the Kings Bench.

CXXV. *Savell and Badcock's Case.*

Savell brought an Action of Trespass against Badcock, and declared, That Edw. Savell was seised of the Mannor of D. and leased the same for years to Henry Savell, who died, having made the Plaintiff his Executor, who entered, and was possessed until the first day of January, at which time the Trespass was done. The Defendant pleaded, Not guilty. And it was given in Evidence on the Plaintiffs part, That the said Ed. Savell was seised, and leased to the said Henry Savell for years, who so possessed, reciting the said Lease, Demised the said Mannor to Sir William Cordell, Master of the Rolls, to have to him immediately after the decease of the said Henry for so many years of the said Term which at the time of his death should be unexpired, if Dorothy the Wife of the said Henry should so long live: Henry died, Sir William Cordell entered; Dorothy died within the Term; the Plaintiff the Executor of Henry entered, and was possessed until the first day of Januarii, 23 Eliz. at which day the Trespass was done. On the Defendants part it was given in Evidence, That after

after the Grant to Sir William Cordell, the said Henry and Edward joyned in a fine Sur Conusans de droit, &c. to a stranger; who granted and rendred the Land to the said Henry and his Heirs, who devised the same to the said Dorothy his Wife for life; the remainder to Cordell Savell in tail, the remainder over; and died; Dorothy entred, and died; Cordell Savell, 22 Eliz. conveyed the Mannor by Fine to one Williamson, who entred; and afterwards and before the Trespass aforesaid, viz. 14 January, 23 Eliz. leased to the Defendant for years, by force of which the Defendant entred. And upon this Evidence, there was a Demurrer in Law. And it was argued by Shuttleworth, who was made Serjeant the last Term. And he said, That the Demise made by Henry Savell is not in the inconduency of the maxim, that Henry by the said Grant should reserve a lesser Estate to himself, than he had before; For here by this Grant, no present interest passeth by Sir William Cordell, but the effect of the Grant rests upon a Contingency; scil. if he himself dieth within the Term, &c. until which time the whole interest of the Term doth remain in the said Henry Savell subject to the Contingency aforesaid, and amounts to so much; as if the said Henry had granted the same to Sir William Cordell, if he himself should die within the Term: In which Case, it is a limitation when the said Grant shall take effect. As if I grant unto you my Lease for so many years as J.S. shall name, the same is a good Grant to take effect upon the naming of J.S. Then the Case being so, When Henry Savell the Lessee, and Edward Savell the Lessor joyn in a Fine, ut supra, now the possibility of the remnant of the Term which upon the death of Henry Savell and Dorothy his Wife within the Term might accrue to the Executors of the said Henry Savell, is not extinct by the Fine, but doth remain Quodam modo in Henry Savell, to vest in his Executors, if it should happen; And here is not any conclusion by the Fine in this Case; for Henry at the time of the Fine had not in him any Interest, which is now claimed, and so cannot be bound by the Fine: For the Interest in respect of which the Plaintiff hath cause of Action, beginneth after the death of Henry who levied the Fine; and first accrueeth to his Executors, and so shall not be touched by the Fine: and therefore if such a Lessee for years granteth his Term to J.S. Proviso, That if J.S. dieth within the Term, that he himself shall have it again; and afterwards the Grantor joyns with his Lessor in a Fine, and afterwards within the Term J.S. dieth, now the Grantor notwithstanding the Fine shall have the residue of the Term; Then, when the Conusee by the Fine regrants the Land to Henry in Fee, that possibility to have after the death of the Defendant cannot be drowned in the Fee simple for the reason aforesaid; And then when Henry deviseth the same to his Wife, that possibility doth pass to Dorothy, because it was never in the Defendant; and then when Dorothy dieth within the Term, the Residue of the said Term shall accrue to the Plaintiff as Executor of Henry.

Henry. Cook, contrary, And he held, The Grant to Sir William Cordell is utterly void; And he agreed, That Grants although in themselves they be uncertain; yet if they may be reduced to certain, they are good: but here is no expectation of any certainty in the life of Henry; for the Term limited to Sir William Cordell, is not to begin till the death of Henry, and is to end upon the death of Dorothy, so as here is not any certain beginning, nor certain end; and here this Grant cannot be reduced to any Certainty during the life of the Grantor, and so for that cause is void, See Plow. Com. 6 Eliz. *Say and Fuller's Case*, 273. by Weston, Justice, If A. makes a Lease for so many years as J.S. shall name, if J.S. in the life of A. name a certain number of years, then the Lease is good; but if the Lease had been for so many years as my Executors shall name, that can never be made good in my life; And upon that reason it is, That an Attornment ought to be made in the life of the Grantor, or else no Reversion shall pass. So 33 E. 3. Entry, 79. A Bishop assigns, and after his death, the Dean & Chapter confirms, it is a void Confirmation. And 7 E. 6. Br. Grants, 154. A Man possessed of a Lease for 40 years, grants so many of the said years which shall be to come at the time of his death, it is a void Grant for the uncertainty. Afterwards, Shuttleworth moved another point, viz. The Plaintiff hath declared of a Trespass done, 1 Januarii, 23 Eliz. The Defendant shews in Evidence, a Lease for years to him made 14 Januarii, the same year, which is 13 days after the Trespass whereof the Plaintiff hath declared, and it shall not be intended that the Plaintiff had another Title than that which he hath alledged; and soasmuch as he hath not disclosed in himself any Title Tempore transgressionis the Plaintiff should punish him in respect of his first possession without any other Title. And although it may be Objected, That where the Defendant hath given in Evidence, That Williamson leased to the Defendant, that is not sufficient; and the words subsequent 14 Januarii, are void as a nugation and matter of surplusage; Truly, the Law is contrary; for rather those words ante Transgressionem shall be void, because too general, and shall give way to the subsequent words after the videlicet, because they are special and certain: As the Case late adjudged; The Archbishop of Canterbury leased three parcels of Land, rendring Rent of 8 l. per annum; viz. for one parcel, 5 l. for another, 50 s. and for the third, 40, which amounts to 9 l. 10 s. It was adjudged, That the videlicet, and the words subsequent concerning the special reservation of the Rent, was utterly void, because contrary to the premises, which were certain, viz. 8 l. and that the Fermor should pay but 8 l. according to the general reservation: but in our case, the words precedent are general, i. e. ante Transgressionem, and therefore the words subsequent, which are special and certain, shall be taken, and the general words rejected; As in Trespass, the Defendant pleads, That A. was seised of the Land where, and held it of the

the Defendant; and that the said A. 1 die Maii, 6 Eliz. aliened the said Land in Mortmain, for which he (within a year after) viz. 4 Maii, Anno 7 Eliz. entred, now the same is no bar; for upon the evidence it appeareth, that the Lord hath surceased his time, and the words, (within the year) shall not help him, for they are too general; and therefore, at the subsequent words (viz. &c.) Cook on the Defendants part took Exception; for it appeareth here upon the Evidence of the Defendant, which is confessed by the Demurrer of the Plaintiff, That upon this matter the Plaintiff cannot punish the Defendant for this Trespass; for he was not an immediate Trespasser to the Plaintiff; for the Plaintiff hath declared upon a Trespass done 1 Januarii, 23 Eliz. And it is given in Evidence on the part of the Defendant, and confessed by the Plaintiff, &c. That 22 Eliz. Cordell Savell levied a Fine to Williamson, by force of which the said Williamson entred, and was seised; and so seised, 14 Januarii, 23 Eliz. leased to the Defendant: Now upon this matter the Plaintiff cannot have Trespass, but the Defendant; for Williamson was the immediate Trespasser to him; for he entred 22 Eliz. And at length, after deliberation had of the premises by the Court, The Court moved the Plaintiff to discontinue his suit, and to bring de novo a new Action, in which the matter in Law might come into Judgment without any other Exception. But the Plaintiff would not agree to it. Wherefore it was said by Wray, Chief Justice, with the consent of his Companions, Begin again at your peril; for we are all agreed, That you cannot have Judgment upon this Action.

CXXVI. *Mich. 26 Eliz. In the Kings Bench.*

The Case was; A. made a Feoffment in Fee to the use of his younger Son in tail; and after to the use of the Heirs of his body in posterum procreand. and at the time of the Feoffment he had Issue two Sons; and after the Feoffment had Issue a third Son: The younger Son died without Issue, Upon a Motion at the Bar, it was said by Wray, Justice, That after the death without Issue of the second Son, the Land should go to the third Son born after the Feoffment, for this word (in posterum) is a forcible word to create a special Inheritance; without that, it had been a general tail.

Mich.

Mich. 26 Eliz. In the Kings Bench.

CXXVII. *Smith and Smith's Case.*

L Ambert Smith Executor of Tho. Smith, brought an Action up, on the Case against John Smith, That whereas the Testator having divers Children Enfants, and lying sick of a mortal sickness, being careful to provide for his said Children Enfants; The Defendant in Consideration the Testator would commit the Education of his Children, and the disposition of his Goods after his death during the minority of his said Children, for the Education of the said Children to him, promised to the Testator, to procure the assurance of certain Customary Lands to one of the Children of the said Testator: And declared further, That the Testator thereupon Constituted the Defendant Overseer of his Will, and Ordained and appointed by his Will, That his Goods should be in the disposition of the Defendant, and that the Testator died, and that by reason of that Will, the Goods of the Testator to such a value came to the Defendants hands to his great profit and advantage. And upon Non Assumpsit pleaded, It was found for the Plaintiff: And upon Exception to the Declaration in Arrest of Judgment for want of sufficient Consideration, It was said by Wray, Chief Justice, That here is not any benefit to the Defendant, that should be a Consideration in Law, to induce him to make this promise; For the Consideration is no other, but to have the disposition of the Goods of the Testator pro educatione Liberorum: For all the disposition is for the profit of the Children; and notwithstanding, That such Overseers commonly make gain of such disposition, yet the same is against the intention of the Law, which presumes every Man to be true and faithful if the contrary be not shewed; and therefore the Law shall intend, That the Defendant hath not made any private gain to himself, but that he hath disposed of the Goods of the Testator to the use and benefit of his Children according to the Trust reposed in him. Which Ayliffe, Justice, granted. Gawdy, Justice, was of the contrary Opinion. And afterwards by Award of the Court, It was, That the Plaintiff Nihil Capiat per Billam.

Mich.

Mich. 26 Eliz. Rot. 495. In the Kings Bench.

CXXVIII. *Amner and Luddington's Case.*

A Writ of Error was brought in the Kings Bench by Amner against Luddington, *Mich. 26 Eliz. Rot. 495.* And the Case was, That one Weldon was leased, and leased to one Peerepoint for 99 years, who devised the same by his Will in this manner: viz. I Bequeath to my Wife the Lease of my House during her life; and after her death, I Will it go amongst my Children unpreferred. Peerepoint died; his Wife entred, and was possessed virtute legationis prædictæ, And took to Husband one Fulsehurst, against whom Beswick recovered in an Action of Debt 1401. Upon which Recovery, issued a Scire facias; and upon that a Vendit' Exponas; upon which the Sheriff sold the Term so Devised to one Reynolds: Fulsehurst died; his Executor brought Error, and reversed the Judgment given against the Testator at the Suit of Beswick; the Wife re-entred, sold the Term, and died; Alice a Daughter of Peerepoint, unpreferred, entred: And upon this matter found by Special Verdict in the Common Pleas; The Entry of Alice was adjudged lawful. Upon which Judgment, Error was brought in the Kings Bench: And it was argued upon the words of the Devise, because here the Lease is not Devised, but all his Interest in the thing Devised: And it is not like to the Case between Welden and Elkington, 20 Eliz. *Plow. Com. 519.* where the Case was, that Davies being Lessee for years, Devised, That his Wife should have and occupy his Land demised for so many years as she should live. Now unto the Case betwixt Paramour and Yardley, 21 Eliz. *Plow. Com. 539.* for there the Lessee Devised, That his Wife should have the Occupation and Profits of the Lands, until the full age of his Son; for in those Cases, the Land it self is quodam modo devised: But in our Case, all the Estate is Devised; i. e. the Lease it self. And also in those two Devises, a certain person is named in the Will, who should take the residue of the Term which should expire after the death of the Wife; but in the Case at Bar, no person in certain is appointed, &c. but the Devise as to that is conceived in general words, Children unpreferred; Ergo, neither any Possibility, nor any Remainder is in any person certain; therefore all the whole Term is intirely in the Wife, and then she may well dispose the whole. But the whole Court was to the contrary, and that in this Case the Possibility should rise well enough upon the death of the Wife, to the Daughter Alice unpreferred. Another Point was moved; If the said Term being sold in the possession of the Wife of the Devisor, by force of the Execution aforesaid; If now the Judgment being reversed, the sale of the Term should be also avoided; for now the party is to be restored to all that which he had lost. And by Cook it was argued,

2 Len. 921
8 Co. 96.

argued, That notwithstanding the reversal of the Judgment, the sale should stand; For the Judgment for the Plaintiff in a Writ of Error is, That he shall be restored to all that which he lost *ratione Judicii prædicti*. and the Judgment was, That the Plaintiff should recover 140*l*. and therefore by the Judgment in the Writ of Error, he shall be restored to so much; but the mean Act, scil. the Sale of the Lease shall stand, and shall not be defeated and avoided: As 7 H.6. 42. A Statute Staple is bailed in Owel Mayn, the Conusor brings Debt against the Bailee, and hath Judgment to recover the Statute, and upon that Suit he had Execution, and the Bailee brought a Writ of Error to reverse the Judgment in *Devinue*, yet the Execution shall stand, and an *Audita Querela* doth not lie for the Conusor. And see 13 E. 3. *Fitz.* tit. Bar. 253. Accomptant found in arrearages, committed to the Goal, escaped; and reversed the Judgment given against him in the Accompt *Ex parte talis*: yet an Action upon the Escape did lie. And as to that Point, the whole Court was of the same Opinion with Cook: But that Point did not come in Judgment: For by the sale, nothing passed but the Interest in *presenti* which was in the Wife of the Debtor, but the Possibility to the Children unpreferred was not touched by it. And afterwards the Judgment was affirmed.

Hill. 26 Eliz. In the Common Pleas. *

CXXIX. *Bunny and Bunny's Case.*

IN an Action of Covenant between Bunny and Bunny, the Plaintiff declared, That the Defendant had Covenanted to find unto the Plaintiff, Heat and Drink at the House of the Defendant. The Defendant pleaded, That he was always ready to find the Plaintiff Heat and Drink, if he had come to his House to have taken it, *Et de hoc ponit se super Patriam*: And it was found for the Plaintiff; And in this Case, the Court awarded, That the parties should replead; For in all Cases where the Defendant pleads matter of excuse not contained in the Declaration as here, he shall say, *Et hoc paratus est verificare*, in the perclose of his Plea: But if the Defendant had pleaded, That he had given the Plaintiff according to the Covenant, Heat and Drink, then the Conclusion of his Plea had been good, *Et de hoc ponit se super Patriam*, &c.

CXXX.

CXXX. *Hill. 26 Eliz.* In the Kings Bench.

IN an Action upon the Case, supposing certain Goods to have come to the hands of the Defendant, and that he had wasted them, and shewed in what manner: The Defendant pleaded Not guilty; And it was found by Verdict, That the Goods, &c. came to the Defendants hands, and that he had wasted them, but in another manner than the Plaintiff had declared: It was the Opinion of the whole Court, That upon this Verdict, the Plaintiff should not have Judgment. As in an Action of Trespass, the Plaintiff declared, That the Defendant had distrained his Horse, and travelled riding upon him; And the Jury found, That the Defendant did distrain the Horse, and killed him; In that case, it was holden, The Plaintiff should not have Judgment. So in an Action upon the Case, the Plaintiff declares upon a Promise upon one Consideration, and the Jury find the Promise, but that it was upon another Consideration; in such case, the Plaintiff shall not have Judgment. Adjudged for the Defendant.

Pasch. 26 Eliz. In the Common Pleas.

CXXXI. *Merry and Lewes's Case.*

Merry brought an Action upon the Case against William Lewes, Executor of David Lewes late Pastor of St. Katherineines juxta London; And Declared, That the said David, in Consideration, That whereas Quædam pars Domus fratrum & sororum Sanctæ Katherine fuit vitiosa & in decasu, the said Merry ad requisitionem dicti Davidis repararet eandem, promised to pay the said Merry all such monies as the said Merry expenderet in such Reparations. And declared further, That eandem partem Domus prædictæ reparavit, &c. And upon Non Assumpsit, It was found for the Plaintiff. It was Objected in Arrest of Judgment, That the Declaration is too general, Quædam pars Domus; For the Plaintiff ought to have shewed especially what part of the House in certainty, as the Hall, Chamber, or other Rooms: But the Exception was disallowed. Another Objection was, Because he set forth in the Declaration, That the Plaintiff ad requisitionem dicti Davidis repararet; And the Plaintiff declares, That reparavit generally, without saying, That ad requisitionem Davidis reparavit: And that is not the Reparation intended in the Consideration, i. e. reparatio ad requisitionem, &c. but a Reparation of his own head, and at his pleasure. And for this Cause, the Judgment was stayed.

2 Len. 53.

2 Cro. 404.

Pasch. 26 Eliz. In the Common Pleas.

CXXXII. *Wrennam and Bullman's Case.*2 Len. 52.
1 Len. 282.

Wrennam brought an Action upon the Statute of 1 & 2 Phil. & Mar. against Bullman, for unlawful impounding of Distresses; and was Non suit: It was moved by Shuttleworth, Serjeant, If the Defendant should have Costs upon the Statute of 23 H. 8. And it was Adjudged, That he should not; And that appears clearly upon the words of the Statute, &c. for this Action is not conceived upon any matter which is comprised within the said Statute; and also the Statute upon which this Action is grounded, was made after the said Statute of 23 H. 8. which gives Costs; and therefore the said Statute of 23 H. 8. and the remedy of it cannot extend to any action done by 1 & 2 Phil. & Mary. And Rhodes, Justice, said, It was so adjudged in 8 Eliz.

CXXXIII. *Mich. 26 Eliz. In the Kings Bench.*2 Len: 161.
Dyer 291.

In a Formedon of a Warrant, The Tenant pleaded Joynt-Tenancy by Fine with J.S. The Demandant averred the Tenant sole Tenant as the Writ supposed; and upon that it was found and tryed for the Demandant: Upon which a Writ of Error was brought; and Error assigned in this, Because where Joynt-Tenancy is pleaded by Fine, the Writ ought to have abated, without any Averment by the Demandant against it, and the Averment had been received against Law, &c. Shuttleworth, At the Common-Law, If the Tenant had pleaded Joynt-Tenancy by Deed, the Writ should have abated, without any Averment; but that was remedied by the Statute of 34 E. 1. But Joynt-Tenancy by Fine doth remain as it was at the Common Law; For he hath satis supplicii, because by his Plea, if it be false, he hath by way of Conclusion given the moiety of the Land in demand to him with whom he hath pleaded Joynt-Tenancy: And the Law shall never intend that he would so sleightly depart with his Land for the abatement of a Writ. As in a Praeipe quod reddat, the Tenant confesseth himself to be a Villein of a stranger, the Writ shall abate without any Averment free, and of free estate; for the Law intends, that the Tenant will not inthral himself without cause. Wray, to the same purpose; But the Demandant may confess and avoid the Fine; as to say, That he who levied the Fine, was his Disseisor, upon whom he hath before entred. And if Tenant in Fee simple be impleaded, and he saith, That he is Tenant for life, the remainder over to A. in fee, and prayeth in Aid of A. the Demandant shall not take Averment, That the Tenant at the time of the Writ brought was seised in fee.

Note: In this Formedon, Joynt-Tenancy was pleaded but as
to

to parcel; And it was holden by Wray and Southcote, That the whole Writ should abate, the whole Writ against all the Defendants. And so where the Demandant enters into parcel of the Land in demand, if the thing in demand be an entire thing, the Writ shall abate in all. In this Writ, the Demandant ought to have averred in his Writ an especial foryeise of the Land parcel of the Land in demand whereof the Joynt-Tenancy by the Fine is pleaded: For this dismembryng of the Mannor and distraction of the Land of which the Joynt-Tenancy is pleaded, is paravall and under the gift whereof the Formedon is conceived; and therefore in respect of the title of the Demandant, it remains in right parcel of the Mannor, and therefore ought to be demanded accordingly with a foryeise. But if A. giveth unto B. a Mannor, except 10 Acres in tail, there, if after upon any Discontinuance, the issue in tail is to have a Formedon; in such case, there needs not any foryeise for the said 10 Acres, for they were severed from the Mannor upon the gift: But if Lands in demand be several, as 20 Acres, except 2 Acres, this foryeise is not good. See Temps E. 1. Fitz. Brief, 866. Præcipe, &c. unam bovatarum terræ forprise, one Sellion, and the Writ was abated, for every demand ought to be certain; but a Sellion is but a parcel of Land uncertain as to the quantity; in some places an Acre, in some more, in some less. Another Point was, Because the Tenant hath admitted, and accepted this Averment; scil. sole Tenant as the Writ supposeth And the Question was, If the Court, notwithstanding the Admittance of the Tenant, ought without Exception of the party Ex Officio, to abate the Writ? And it was the Opinion of Wray, Chief Justice, That it should: For it is a positive Law, As if a Woman bring an Appeal of Murder upon the death of her Brother, and the Defendant doth admit it without a Challenge or Exception, yet the Court ought to abate the Appeal, 10 E. 4. 7. See the principal Case there, Non ideo puniatur Dominus, &c. And if an Action be brought against an Hostler upon the Common Custom of the Realm, and in the Writ he is not named Common Hostler, yet the Court shall abate the Writ Ex Officio. See 11 H. 4. and 38 H. 6. 42.

CXXXIV. *Mich. 26 Eliz. In the Common Pleas.*

A. Seised of Lands in the right of his Wife for the Term of the life of the Wife, made a Feoffment in Fee to the use of his said Wife for her life; It was holden in that Case, That the Wife was remitted. And it is not like Amy Townsends Case, Plow. Com. 1 & 2 Phil. and Mar. 111. For in the said Case the Entry of the Wife was not lawful, for she was Tenant in tail; which Estate was discontinued by the Feoffment of her Husband. And Periam, Justice, cited a Case, Sidenham's Case; Bacon seised in the right of his Wife for the Term of the life of the Wife; They both surren-

died, and took back the Lands to them and a third person : And it was holden, That the Wife was not presently remitted, but after the death of her Husband she might disagree to the Estate.

Mich. 26 Eliz. In the Common Pleas.

CXXXV. *Harper and Berrisford's Case.*

IN a Writ of Partition, The Defendant demanded Judgment of the Writ, because the Writ is, Quare cum A. teneat, &c. pro indiviso, &c. 4 mille acras; whereas it should be, Quatuor Mille acrarum. And many Grammarians were cited; all which agreed, That it was good both ways; viz. Mille Acras, or Mille Acrarum. And Rhodes, Justice, said, That Cowper, in Thesuro suo Linguae Latinae, saith, Quod Mille fere jungitur Genitivo, Ergo non semper. Wherefore Anderson, with the assent of the other Justices, Ruled, That the Defendant should answer over.

Trin. 26 Eliz. In the Kings Bench.

CXXXVI. *Hering and Badlock's Case.*

2 Len. 80.

IN a Replevin, the Defendant avowed for Damage-feasant; and shewed, That the Lady Jermingham was seised of such a Mannor whereof the place where, &c. and leased the same to the Defendant for years : The Plaintiff said, That long time before, King Henry 8th was seised of the said Mannor, and that the place where, &c. is parcel of the said Mannor Demised and Demiseable by Copp, &c. and that the said King by such a one his Steward, demised and granted the said parcel to the Ancestor of the Plaintiff, whose Heir he is by Copp in Fee, &c. And upon that there was a Demurrer, because by this Bar to the Avowry, the Lease set forth in the Avowry is not answered; for the Plaintiff in Bar to the Avowry, ought to have concluded; and so was he seised by the Custom, until the Avowant pretexts of the said Term for years, entered, &c. And so it was adjudged.

Mich. 26 Eliz. In the Kings Bench.

CXXXVII. *Rosse's Case.*

Ante 83.

IN Trespass brought by Rosse, for breaking of his Close, and beating of his Servant, and carrying away of his Goods: Upon Not guilty pleaded, the Jury found this special matter; scil. That Sir Thomas Bromley, Chancellor of England, was seised of the Land where, &c. and leased the same to the Plaintiff and one A. which A. assigned his moiety to Cavendish; by whose Commandment the Defendant entered. It was moved, That that Tenancy in Common betwixt the Plaintiff, and him in whose right the

the Defendant justified, could not be given in Evidence; and so it could not be found by Verdict, but it ought to have been pleaded at the beginning. But the whole Court were clear of another Opinion; and that the same might be given in Evidence well enough. It was further moved against the Verdict, That the same did not extend to all the points in the Declaration, but only to the breaking of the Close, without enquiry of the battery, &c. And for that cause, it was clearly holden by the Court, That the Verdict was void; And a Venire facias de novo was awarded.

Trin. 26 Eliz. In the Kings Bench.

CXXXVIII. *Gurney and Saers Case.*

AN Ejectione firmæ was brought by Gurney against Saer; who pleaded, That Verney was seised, and leased the same to Baker for 21 years, 8 Eliz. Baker, 14 Eliz. assigned his Interest to Rolls; who, 15 Eliz. leased the same to Topp for 10 years; and afterwards Rolls granted the residue of his Term to A. Verney, 16 Eliz. leased the same Land to Stephen Gurney for 21 years, to begin after the determination, surrender, or forfeiture of the first Lease, rendering Rent, with Clause of Re-entry; And afterwards Verney granted over the Reversion in Fee to Hampden; To which Grant, A. and Topp attorned; Topp leased to B. at Will; A. and Topp surrendered; B. held himself in by force of the Tenancy at Will; And the said Surrender was made privately and secretly, without the notice of the said Stephen Gurney; The Rent reserved upon the Lease made to Stephen Gurney is demanded, as now begun by the said Surrender. Hampden entered as for the Condition broken for the non-payment of the said Rent: And the Lease made to the said Stephen Gurney was pleaded, Quod prædictus Johannes Verney per Indenturam suam sigillo ipsius Stephani Gurney sigillat. demisit, &c. And that was holden a material Exception; For here upon the matter doth not appear any Lease made by Verney. For here upon the pleading it appeareth, That Verney had accepted a Deed of Gurney, purporting a Demise by Verney to Gurney, which Gurney had sealed; but there did not appear any such Deed sealed by Verney, and therefore no Lease ut supra. And although a Condition may be pleaded by Indenture sealed with the seal of the other party, yet a Conveyance cannot be pleaded by Deed as it is here, unless sealed with the seal of the party Agent; scil. the Feoffor, Grantor, Lessor: And for that cause, Judgment was given for the Plaintiff. Another Exception was taken, because that after the Grant of the Reversion by Verney to Hampden, the surrender of A. and Topp is pleaded; whereas A. ought not to surrender; for his Estate was not a Reversion for years, but a Lease in Reversion, and a Lease for years to begin at a day to come, which could not be surrendered. See

4 H. 7. 10. But if A. had granted his Interest by way of Reversion, where Attornment had been, as one Release to him the Reversion for years, it is good; contrary to him who hath a Lease in Reversion. But as to that, it was said by the Court, That this surrender by A. was good enough, for in as much as the Interest which A. had at the time of the surrender was in Rolls a Reversion after his Grant to Topp, and there it remained and continued in its nature as to that point; notwithstanding that by the Grant it passed in another manner, than as a Reversion. Another Exception was taken, because that in the pleading of the Surrender, it is not alledged, That at the time of the Surrender, Hampden was seised of the Reversion. 7 E. 3. 3. He who claims by Cestuy que use, ought to alledge the Seisin and Continuance of Seisin to the said use at the time of the Feoffment or Grant, notwithstanding that Seisin was alledged before. And 10 H. 7. 28. Hewbade's Avowry, he there pleaded, That A. was seised of a Mannor, and thereof levied a fine to B. & that C. the Tenant upon whom the Avowry was made, attorned, &c. And Exception taken, because it is not shewed in the Avowry, That B. the Conusee was seised of the Mannor at the time of the Attornment. And it was holden a good Exception. On the other side it was said, and affirmed by the Court, That in all Cases where an Inheritance is once alledged in a Plea, the Law shall presume the Continuance of it there, until the contrary be shewed. See 1 Eliz. the Case between Wrottesley and Adams, *Plow. Com.* 193. And 15 Eliz. between Smith and Stapleton, *Plow.* 431. Which Wray and Gawdy, Justices, granted: Ayliff, Justice, to the contrary. Another point was moved, If upon this secret Surrender notice ought to have been given to Gurney, who had an Interest for years to begin upon the said Surrender; for some conceived, That Gurney, without notice given him of the said Surrender, should not be prejudiced by the Condition aforesaid. And of that Opinion clearly was Wray, Chief Justice,

Note, In this Case, That Saer, the Defendant, presently after the Judgment entered, cast in a Writ of Error into the Court; and assigned an Error in fact; scil. That Gurney the Plaintiff in the first Action within age, appeared by Attorney; whereas he ought by Gardein or Prochein Amy. And it was the Opinion of the Justices upon the first Motion, That that matter could not be assigned for Error; for it is not within the Record, and we cannot reverse our own Judgment, but only for matter of Process. See for that, *Fitzh. Na. Br.* 21. f.

Pasch. 26 Eliz. In the Kings Bench.

CXXXIX. *Partridge and Pooles Case.*

Trespas of Battery was brought by Partridge against Poole, ^{2 Len. 79.} and supposed the Battery at D. in the County of Middlesex; ^{1 Cro. 842.} The Defendant justified by reason of an Assault at S. in the County of Gloucester, absq; hoc, that he beat the Plaintiff at D. in the County of Middlesex: Upon which traverse, the Plaintiff did demur in Law. It was argued by Popham the Queens Attorney General, That the traverse of the County is good: And he put the Case of 21 H. 6. 8 & 9. In Trespas of Battery at D. in the County of York; the Defendant justified by an Assault at London in such a place in such a Parish, &c. absq; hoc, that he was guilty de aliqua transgression in Comitatu Eborum. Upon which issued a Venire facias into Yorkshire; and, as the Book is, This traverse as to the County was taken with great deliberation. See also 22 E. 4. 39. And this traverse de jure ought to be allowed; For the Jury in Middlesex are not bound to find the Assault in the County of Gloucester. See 2 Mar. Br. Jurours, 50. In Actions upon transitory matters, although they be layed in foreign Counties, yet the Jurors if they will, may thereof give their Verdict; but they are not bound to do it. Egerton, Solicitor General, to the contrary: And he put a difference, where the justification is local, and where transitory: As in False Imprisonment, the Defendant justifies as Sheriff the taking of the Plaintiff by force of a Capias directed to him at D. within his County of G. Where the Plaintiff declareth of an Imprisonment in another County; there the traverse of the County is good, for the Defendant cannot take the Plaintiff by force of the said Process in any other County than where he is Sheriff; and so the Justification is local, 11 H. 4. 157. But in our Case, the matter of the Justification is merely transitory. And at last, after many Motions, It was adjudged for the Plaintiff. Gawdy, Justice, being of a contrary Opinion: And by Wray, Chief Justice, clearly, The Jurors upon pain of Attaint, are to take notice of such a transitory thing done in another County. See 2 Mar. Br. Attaint, 104. 9 H. 6. 63.

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Pasch.

Pasch. 26 Eliz. In the Common Pleas.

CXL. Gerrard's Case.

1 Len. 168.

4 Len. 7.

Gerrard, Master of the Rolls, presented Chatterton Bishop of Chester, to the Church of Bangor; to which Church also, one Chambers presented his Clerk; by which several Presentments, the same Church became Litigious: The Archbishop of York being Ordinary of the place, awarded Jure Patronatus, &c. depending which, the Archbishop admitted the said Bishop; upon which, the said Chambers Libelled in the Spiritual Court, against the said Bishop; For that the said Archbishop prædicto Episcopo plus æquo fidens, admisit dictum Episcopum, pendente the Jure Patronatus; in which Case by the Law of the Church, the Admittance is hold; For, pendente Lite nihil movetur. And now came the said Bishop, and upon this matter prayed a Prohibition; and he had it, because that the right of the Patronage came in debate. After which came the said Chambers, and prayed a Consultation, because he medled not with the right of Patronage, but only with the wrongful admittance. To whom it was said by the Court, That the awarding of the Jure Patronatus, is not a thing of necessity, but at the Will of the Ordinary, and for his better Instruction: But if he will at his peril take notice of the right of the Patronage, he may receive which of them he will, without a Jure Patronatus awarded. And it may be, in this Case, That after the Jure Patronatus awarded, and before any Clergia given upon it, the Archbishop was satisfied of the right of the now Plaintiff in the Prohibition to the Patronage, and thereupon admitted the Clerk; And by the clear Opinion of the Court, the Consultation was denied.

Trin. 26 Eliz. In the Kings Bench.

CXLI. Rampston and Bowmer's Case.

In an Action upon the Case, the Plaintiff declared, That whereas the Plaintiff occupied a Brew-Houle; And whereas one Gilbert Bowmer was the Beer-Clerk of it, and had the government and disposition of the Beer brewed there, by reason whereof he became indebted to the Plaintiff in such a sum; For which the Plaintiff procured the said Gilbert to be Arrested, and put into the Prison of the Marshalsey; And whereas the said Gilbert in dicta prisona existente, the Defendant tunc & ibidem in Consideration that the said Plaintiff would let the said Gilbert out of Prison, Promised, That if the said Gilbert should not accompt with the Plaintiff, and pay him all the Arrearages, which upon such Accompt should be found before such a day, That then the Defendant would pay

pay it: Upon which the said Gilbert was dismissed ad largum: And further declared, That no Accompt had been made by Gilbert, or any other satisfaction. And upon Non Assumpsit, the Jury found; That the said Gilbert so indebted to the Plaintiff, was arrested at the Suit of the Plaintiff; and that after, the Defendant came unto the Bailly of the Marshal who arrested the said Gilbert, and took upon him to the said Bailly, That the said Gilbert should be at the next Court holden for the said Marshalley; by force and reason of which promise, the Bailly suffered the said Gilbert to go at large to his House, &c. and that after and before such Court, the Defendant promised the Plaintiff modo & forma, as the Plaintiff had surmised in his Declaration: And upon that Verdict, the Plaintiff could not have Judgment; For here the Consideration laped in the Declaration is not found by the Verdict; For Gilbert was discharged of the Imprisonment before the promise of the Defendant to the Plaintiff: And the Declaration is, That in Consideration quod dictus Gilbertus ad largum dimitteretur, &c. And Judgment was given Quod Querens Nihil Capiat per Billam.

CXLII. *Mich. 26 Eliz.* In the Common Pleas.

One recovered certain Copphold Lands in the Court of the Lord of the Mannor by plaint in the nature of a Writ of Right: It was moved in the Common Pleas, If a Precept might be made and awarded out of that Court for to execute the said Recovery, and to put him in possession who recovered, with the Posse Materii, as in such Cases at the Common Law, with the Posse Comitatus. But it was clearly Resolved, It could not be done; For force in such cases is not justifiable, but by Command out of the Kings Courts.

Mich. 26 Eliz. In the Common Pleas.

CXLIII. *Iplett and Williams's Case.*

IPlett brought an Action upon the Case against Williams, and declared, Whereas one J. had affirmed a Plaint of Debt against the Plaintiff in the Queens Court of her Mannor of D. in the County of Cornwall; and demanded against him 100 l. And whereas the Defendant now Plaintiff sued a Corpus cum Causa, &c. and delivered the same to the now Defendant, being then Under-Steward of the said Court, That notwithstanding that the now Defendant proceeded to Judgment, and awarded Execution against the Plaintiff and his Sureties, by force of which the Goods of the Plaintiff and of his Sureties were taken in Execution; Upon which Declaration, the Defendant demurred in Law, because the Judgment was given in a Court Baron, which could not hold plea above the sum of 40 s. And notwithstanding that

Exception, and notwithstanding also that the Action was brought against the Under-Steward, &c. The Plaintiff had Judgment to Recover.

Pasch. 26 Eliz. In the Kings Bench.

CXLIV. *Denton and Goddard's Case.*

DEbt was brought against Denton Administrator of the Goods and Chattels of James Newton; and the Plaintiff declared upon an Obligation made to the Intestate bearing date the 4th day of April, 24 Eliz. The Defendant prayed Oyer of the Deed and Condition; and then pleaded to the Action: For he said, That the aforesaid James Newton, ante Confectionem prædicti suppositi scripti, scilicet ultimo die Septembris 23 Eliz. apud N. obiit, and so Non est factum, &c. The Jury found, That the said Deed was delivered to the Intestate 3 July, 23 Eliz. in the life of the Intestate, bearing date 24 Aprilis, 24 Eliz. before which day, the Intestate died: And upon the whole matter, Judgment was given for the Plaintiff.

Pasch. 26 Eliz. In the Kings Bench.

CXLV. *Lichfield and Gage's Case.*

2 Len. 167.

IN an Ejectione firmæ the parties were at Issue; And by Order of the Court, the Tryal was stayed: And yet the Plaintiff against the Order, obtained privily a Nisi Prius: Upon which Gawdy, Justice, being informed of it after the Term, awarded a Superedeas to the Justices of Assise, before whom, &c. And notwithstanding that, the Enquest at the Instance of the Plaintiff, was taken, and found for the Plaintiff. All this matter was shewed to the Court, in the Kings Bench, and there examined and proved; And it was Ordered by the Court, That the Verdict should not be entred of Record, nor any Judgment upon it: And so was it put in execution in a Case between Vernon and Fowler. And then the Counsel moved and took Exception to the Superedeas, because it was not subscribed by the hand of Justice Gawdy. But it was not allowed, because his Seal was sufficient.

Pasch. 26 Eliz. In the Kings Bench.

CXLVI. *Fuller and Cook's Case.*

1 Roll. 111.

IN an Action upon the Case, the Plaintiff declared, That the Defendant had informed one Tho. Colby a Justice of the Peace, That the Plaintiff had stolen the Defendants Hogs; By force of which, the said Colby ad Querimoniam Defendentis, made a Warrant, and directed it to the Constable of H. to apprehend the

the Plaintiff, and to bring him before the said Colby; By force of which, the Plaintiff was Arrested, and brought before the said Colby, and there was examined upon the said matter, and bound over by Recognizance to appear at the next Sessions, and there to Answer; at which Sessions he appeared; And Proclamation was made, That if any one would inform against the Plaintiff, &c. and none came; For which the Plaintiff was discharged, and so by this matter he was discredited, &c. And all this matter was found by Special Verdict; And thereupon Judgment was given for the Plaintiff. And in this Case the Court took a difference, Where one whose Goods are stolen comes to a Justice of Peace, and shews him the matter, and prays that the matter be examined, and that such a one is examined upon it; here in this case, No Action lieth. But if such a person in such case will expressly say, That such a one hath stolen, &c. and procure a Warrant from a Justice of Peace upon such Surmise to arrest the party; upon such matter, an Action upon the Case will lie.

Hob. 192.

Trin. 26 Eliz. In the Exchequer.

CXLVII. The Queen and the Lord Lumley's Case.

IT was moved in the Exchequer, That Queen Mary leased of the Rectory of D. granted Advocationem Ecclesie de D. If now by this Grant, the Advowson should pass as now disappropriate; Or that the Rectory it self should pass as appropriate; Or that nothing at all should pass? And by Manwood, Chief Baron, the Advowson shall not pass, but remain appropriate as it was before; For the Church as it was appropriate by a Judicial act, so without such an Act it cannot be disappropriate. And he said, That by the Grant of the said Advowson, the Rectory did not pass; For by the Appropriation, the Advowson was gone, and it was not in esse, and by consequence, could not be granted: And it is not within the Statute of 4 & 5 Philip & Mary, of Confirmations of Grants of the King; For the said Statute helps not, but misrecital, misnaming, &c. But here there is not such a thing in rerum natura, as the Patentee pretends to be passed by the Letters Patents; And if it were in the Case of a Common person, nothing should pass; As it was adjudged in Sands Case, 11 Eliz. And he said, That at this time a Parsonage might be disappropriated; but that ought to be by a Judicial Act; as by Presentment, and not by any private Act of the Proprietor: And so he said, a Church was disappropriated by the Lord Dyer, by a Presentment which of late he made to it.

2 Len. 80.
Hob. 304.

Mich.

Mich. 26 Eliz. In the Kings Bench.

CXLVIII. Cox's Case.

IN Debt upon an Obligation against Cox, the Case was; A Parson made a Lease for years, and became bounden to the Lessee, to perform the Covenants in the Lease: The Defendant pleaded, That the Lease is void, by the Statute of 14 Eliz. because he was absent from his Benefice above the space of 80 days; part of which time incurred depending the Action, and before the Plea was pleaded: It was the Opinion of the Court, That the Plea was good. But Exception was taken to the pleading; The Defendant saith, That the said Church is a Parochial Church cum Cura animarum, but doth not say, That it was so at the time of the Lease and Obligation made: For it may be, that at the time of the Lease there was a Vicar; and then it was not Cura animarum. And afterwards upon that Exception, Judgment was given for the Plaintiff.

Pasch. 26 Eliz. In the Kings Bench.

CXLIX. Wroth and Capell's Case.

4 Len. 197.

The Case was; A. was Indicted upon the Statute of 8 H. 6. And Exception was taken to the Indictment, because no word of Freehold was in it; or to prove, that the party grieved had any Freehold whereof he might be disseised. But because the words of the Indictment were, Expulit & disseisivit, which could not be true, if the party expelled and disseised had not Freehold, the Exception was disallowed. Another Exception was taken to the Indictment; For these words, In unum tenementum intravit; and this word Tenementum, is too general, and an uncertain word; and therefore as to that, the party was discharged. But the Indictment was further, In unum Tenementum & decem acras terre eidem pertinent. And therefore as to the 10 Acres, the party was enforced to Answer.

CL. *Pasch. 26 Eliz. In the Common Pleas.*

A. Granted to B. a Rent-charge out of his Lands, to begin when J.S. died without Issue of his body; J.S. died, having Issue; which Issue died without Issue. Dyer said, The Grant shall not take effect; for J.S. at the time of his death had Issue: and therefore then the Grant shall not begin; and if not then, then not at all. And by Manwood, If the words had been, To begin when J.S. is dead without Issue of his body, then such a Grant should take effect when the Issue of J.S. dieth without Issue, &c. Dyer, If the Donee in tail both Issue, and dieth without Issue, The Formedon in Reverter shall suppose that the Donee himself died without Issue; for there is an Interest, and there is a difference betwixt an Interest and a Limitation: for if I give Lands to A. and B. for the Term of their lives, if any of them dieth, the Survivor shall have the whole. But if I give Lands to A. for the life of B. and C. now, if B. or C. die, all the Estate is determined, because but a Limitation, and B. and C. had not any Interest. See Cook 5 Part, Bradnell's Case.

CLI. *Pasch. 26 Eliz. In the Common Pleas.*

A. Enfeoffed B. upon Condition, That if he pay 10 l. to the Feoffee, his Executors or Assigns, within 3 years next ensuing, that then it should be lawful for him and his Heirs to re-enter. The Feoffee hath Issue two Sons, whom he makes his Executors, and dieth before the day of payment. The Ordinary commits Matters of Administration to J.S. during the minority of the Executors. Manwood conceived, That it is a most sure way for A. to pay the Monies to the Executors, for they remain Executors notwithstanding the Administration committed to another: for the Administrator in such case is but as Bailiff or Receiver to the Executors, and shall be accountable to them; which Harper and Dyer, Concesserunt: And Manwood said, If in this Case the Monies be paid to one of the Executors, it is sufficient, and the same well paid; but that Conditional Feoffments are as a Sum in gross, and not in nature of a Debt: which the rest of the Justices granted.

4 Len. 232.
1 Len. 235,
286.
Hill. 12.
Car. 2 B.R.
Goodyer and
Clarke's Case.

CLII. *Pasch. 26 Eliz. In the Common Pleas.*

A. Seised of a Mannor leased the same for years, rendering Rent, with Clause of re-entry; and afterwards died a Fine Sur Contusans de Droit, to the use of himself and his Heirs; The Rent being demanded, is behind. Dyer, A. cannot re-enter; for although in right the Rent passeth without Attornment, yet he is without remedy; for it is without Attornment: and it would be hard without Attornment to re-enter, &c.

It

2 Inst. 309.

It was moved further, If here the Conusor be Assignee within the Statute of 32 H. 8. Manwood, The Reversion of a Term is granted by Fine, there wants privity for an Action of Debt, Waste, and Re-entry: But if the Conusor dieth without Heir, although that in right it was in the Conusor; yet the Lord by Escheat shall make Abowyn, and yet the Conusor by whom he claimeth, could not. And in the Case at Bar, the Conusor himself could not; but the Conusor being Cestuy que use, who is in by the Act of Law, shall abowyn, and shall re-enter without Attornment: For the Conusor is in by the Statute of 27 H. 8. Harper, The Heir of the Conusor shall abowyn and re-enter before Attornment. Dyer, 13 H. 4. The Father leaseeth for years rendring Rent, with Clause of re-entry; the Father demands the Rent, which is not paid; the Father dieth, the Son cannot re-enter, for the Rent doth not belong unto him: And therefore in the Case at Bar, the Conusor cannot abowyn for the Rent before Attornment; therefore not re-enter.

CLIII. Trin. 26 Eliz. In the Common Pleas.

It is Enacted by the Statute of 5 Eliz. Cap. 8. That no person shall cut down any Oak Trees but between the first day of April, and the last day of June, but Timber employed and bestowed in or about Buildings or Reparations of Houses, &c. And upon an Information upon that Statute, the Defendant pleaded, That he cut down the said Oak Trees and thereof made Laths to be bestowed in building, and that he had sold them to J.S. who had employed part of them in building, and is employing the residue in the same manner. Windham, The intent of the Defendant in cutting down the Oaks, was not to have them employed in building, but to sell them: Although it is not necessary for the satisfaction of that Statute, that the Oaks presently after the cutting be employed about building; For if the Lessee of a Messuage, who is to have House-hote, seeing that his Messuage will want reparation, cutteth down a Tree for such intent, although there be not such urgent occasion at present, that it ought to be presently repaired, the same shall not be said Trespass; for it is good Husbandry to have such Timber to be seasonable, which cannot be, without some reasonable time between the cutting down and the employment. Periam, If at the time of the cutting, the Lessor or Lessee had an intent to employ them about building, it is good enough: And it is a strong Case here, because the Defendant employs the Timber himself in Laths, which is not of any use but for building; and cannot be made but of Timber.

Trin.

Trin. 26 Eliz. In the Kings Bench.

CLIV. *Eve and Finch's Cafe.*

PETER EVE and John Finch brought an Action of Trespass against Nathaniel Tracy and Margaret his Wife: and upon the pleading, the Case was, that John Finch, Father of J.F. the Plaintiff, seised of the Manor of St. Katherine's, held the same of the Queen by Knight service in Chief, and was also seised of the Land where the Trespass was done, being holden in Socage; and so seised, 6 Junij, 20 Eliz. for the preferment of the said Margaret then his Wife, enfeoffed of the said Manor A. and B. unto the use of himself and the said Margaret, and their Heirs. And that the said John the Father had not any other Land but that before mentioned; and that the said Manor at the time of the said Feoffment, and at the death of the said John the Father attained ad duas partes of all the Lands and Tenements of the said John the Father in three parts to be divided. And afterwards, the Father by his Will devised the Lands holden in Socage, unto his said Wife for life, with divers Remainders over: It was the Opinion of the Court in this Case, that the Devise was utterly void by the Statute.

Pasch. 26 Eliz.

CLV. *Brett and Peagrims Cafe.*

IN an Action upon the Case, the Plaintiff declared, that whereas he himself and the Defendant submitted themselves to the Award of A.B. and C.D. and whereas the said Arbitrators upon the hearing of the Causes between them, did intend, and were resolved, amongst other matters of their Award, to award, that two Obligations by which the Plaintiff was severally bounden to the Defendant for the payment of certain sums of Money to the Defendant, should be delivered by the Defendant to the Plaintiff to be cancelled: The Defendant promised, in Consideration, that that Article of the delivery of the said two Obligations should be left out of the Award, that he himself would gratis deliver them to the Plaintiff without any Coercion or direction of the Award: and further declared, that the said Article ad specialem instantiam ipsius Querentis was left out by the said Arbitrators out of their Award; and notwithstanding that, that the Defendant had not redelivered, ut supra, &c. but had put the same in suit against the Plaintiff: In this Case, upon the matter, ut supra, &c. it was adjudged for the Plaintiff.

P

Pasch.

Pasch. 26 Eliz. In the Kings Bench.

CLVI. *Nich. Lee's Case.*

1 Cro. 26.
 1 Len. 285.
 1 Inst. 113.
 Dyer 177.
 219. a.
 2 Len. 220.

Nich. Lee by his Will devised his Land to W. his second Son; And if he do depart this World, not having Issue, then I Will my Sons-in-Law shall sell my Land. The Devisor at the time of the Devise having six Sons-in-Law, died; W. had Issue John and died; John died without Issue; one of the Sons-in-Law of the Devisor died; the five surviving Sons-in-Law sold the Land. 1. It was clearly agreed by the whole Court, that although the words of the Will be, ut supra, If W. my Son depart this World, not having Issue, &c. And that W. hath Issue which dieth without Issue, there although it cannot be said Literally, that William did depart this World not having Issue; yet the intent of the Devisor is not to be restrained to the Letter; but Construction shall be made, that whensoever W. dieth (in Law upon the matter) without Issue, the same Land shall be subject to sale according to the Authority committed by the Devisor to his Sons-in-Law: And now upon the matter W. is dead without Issue. As in a Forfeiture in the Reverter or Remainder, although the Donee in tail hath Issue, yet if afterwards the Estate tail be spent, the Writ shall suppose, that the Donee died without Issue: a fortiori in the case of a Devise, such Construction shall be made.

As to the other point concerning the sale of the Land, Wray demanded, if the Sons-in-Law were named in the Will? The Clerks answered, they were not. See 30 H. 8. Br. Devise, 31 and 39 Afs. 17. *Fitz. title, Executors*, 117. Such a sale is good in case of Executors. See also, 23 Eliz. Dyer, 371. And see 4 and 5 Mar. Dyer, Land devised in tail, and if the Devisee shall die without Issue, that then the Land shall be sold pro optimo valore by his Executors una cum assensu of A. if A. dieth before sale, the power of the Executors is determined. And afterwards it was clearly resolved by the whole Court, that the sale, by the manner aforesaid was good; and Judgment given accordingly.

Trin. 26 Eliz. In the Kings Bench.

CLVII. *Rag and Bowley's Case.*

Error was brought upon a Fine, and the Error was assigned in the Proclamations: Whereupon issued a Certiorari to the Custos Brevium, who certified the Proclamations; by which Certificate it appeared, that two of the said Proclamations were made in one day: upon which the Defendant payed another Scire facias to the Chirographer; in whose Office it appeared, that all the Proclamations were well and duly made. It was the Opinion

nion of Wray, Chief Justice, in this Case, that the Defendant ought to have his preyer; for the Chirographer maketh the Proclamations, and he is the principal Officer as to them. And the Custos Brevium, hath but the abstract of the Proclamations; and we may in discretion amend them upon the matter appearing. But the other Justices seemed to be of a contrary Opinion; for that the Proclamations being once certified by the Custos Brevium, who is the principal Officer, we ought not afterwards to resort to the Chirographer, who is the inferior Officer: And afterwards, the Clerks of the Common Pleas were examined of the matter aforesaid by the Justices of the Kings Bench; and they answered according to that which was said by Wray, Chief Justice. Wherefore it was awarded by the Court, that a new Certiorari be directed to the Chirographer: who Certified the Proclamations to be well and duly made. And thereupon the Court awarded, that the Proclamations in the Office of the Custos Brevium, should be amended according to the Proclamations in the Custody and the Office of the Chirographer.

Note, In the same Case, before the Writ brought, a stranger had brought a Writ of Error against the same Defendant upon the same Fine; upon which the transcript of the Fine and Proclamations are removed in Banco, and after the Plaintiff is Non-suit. Now another who hath Cause, may have a Writ of Error, quod coram vobis residet.

Trin. 26 Eliz. In the Kings Bench.

CLVIII. *Taverner and Cromwell's Case.*

UPON an Evidence unto a Jury, containing difficulty and matter in Law; it was found, viz. that the Bishop of Norwich, 10 H. 8. was seised of the Mannor of Northelman in the right of his Bishoprick; and, at his Court holden within the same Mannor, granted parcel of the Demesnes of the said Mannor to one Taverner and his Heirs, where, of the said Land in truth, there was not any Demise by Copp before: And so the said Land continued in Copp until 23 H. 8. at which time, Taverner committed a forfeiture; which being presented, the Bishop seised the Land as forfeited; and granted the same again by Copp to Taverner in Fee: And so from thence it continued in Copp until 8 Eliz. (which Interval between 23 H. 8. and 8 Eliz. amounted to 47 years:) It was the Opinion of the whole Court in this Case, that the Continuance for 50 years, is requisite to fasten a Customary Condition upon the Land against the Lord. It was also agreed by the Court, that although the Original Commencement, and that Customary Interest did commence 10 H. 8. ut supra, from which time, unto 8 Eliz. 60 years passed; yet the seizure for a forfeiture which happened 23 H. 8. interrupted utterly

3 Cro. 3534

the Continuance from the time which might by the Law have perfected the Customary Interest. So that now, the time before the forfeiture ought not to be accounted in this Case: But the Original beginning of the Copyhold shall be holden to be 23 H. 8. when the Grant de Novo by Copy was made; between which time, and 8 Eliz. is an interval but of 47 years; within which time, a Customary Interest cannot be attached upon the Land: And then before sufficient time incurred, &c. the Lord may well enter upon such a Tenant at Will: For as yet, there is not any Custom begotten by sufficient time to bind him. It was also agreed by the Justices, That if the Lord of a Mannor is seised of an ancient Copyhold for forfeiture, or by reason of Escheat, and Lett the same at Will without any Copy for divers years, one after the other, that that is not any Interruption of the Customary nature of the Land; but that the Lord may grant it again by Copy.

As to other parcel of the Land, It was given in Evidence, That at a Court lately holden at Northelman, It was presented by the Homage there, That Taverner the Plaintiff being a Copyholder of the said Mannor, had forged a Customary of the said Mannor, containing divers false Customs, pretending them to be true Customs of the said Mannor, and that he had forged, and put a Seal to it, about which, this word, viz. (Northelman) is engraven; And that he had procured divers Copyholders of the said Mannor to set their seals to it; and that he said unto them, That that Customary should be put into the Church of Northelman amongst the Charters and Evidences of the said Church: And that he had now made his Copyhold as good as his Freehold. And, If the said Offence committed by the Plaintiff, ut supra, be a forfeiture of his Copyhold, was the Question? It was argued by Popham, who was of Counsel with the Plaintiff, That without further matter, it was not any forfeiture; And yet he confessed, It is a forgery against the first branch of that Statute of 5 Eliz. cap. 14. And so he said it was lately adjudged in the Star-Chamber: But as to the point of Forfeiture, he put this difference; If the Lord demand his Services of his Copyholder, there, If the Copyholder upon debate between the Lord and himself, sheweth forth such a forged Customary, and Counterpleads the Demand of the Lord with it; now it is a forfeiture, for that the Inheritance of the Lord is thereby hazarded: As, if the Copyholder after the forfeiture keep it himself, and doth not encounter his Lord in his demand with it in his services, the same is not any forfeiture: As, if the Copyholder, before any Rent be due, saith, That he will not pay any Rent to the Lord hereafter: Or when a Court is to be holden, That he will not after appear to do any Suit at the Court of his Lord, &c. But if, his Rent being due, he denieth it; Or when the Court is holden, he saith, That he will not do any Suit; the same is a forfeiture: As it was lately adjudged in the Kings Bench

Bench, in the Case between Sir Christopher Hatton, and his Coppholders of his Mannor of Wellingborough. So if a Coppholder being with the other Coppholders charged upon Oath to enquire of the Articles of the Court-Baron, and sufficient matter being given to them in Evidence, to induce them to find a matter within their Charge, and they or any of them obstinately refuse to find the same, the same is a forfeiture of his Copphold; As it was adjudged in the Case of Sir Rich. Southwell, Knight, and Thurston. Clench, Justice, conceived, That in the principal Case, the Offence of the Plaintiff, is not any forfeiture, no more, than if a Coppholder makes a Charter of Feoffment of his Customary Land, and delivereth the same as his Deed to the party, but doth not execute it by Livery, the same is not any forfeiture. It was argued by Gawdy, Serjeant, who was of Counsel with the Defendant, to the contrary: For he said, That if a Coppholder will forge a Deed of Feoffment, purporting, That the Lord of the Mannor hath enfeoffed him of the said Customary Land, notwithstanding that he keepeth such Charter himself, without shewing it forth, yet it is a forfeiture. At the length, The Court wished the Jury to find the special matter, and to refer the same to the Court, Whether it was a forfeiture, or not. In this Case, another matter was moved, viz. The Ancestors of the Plaintiff had purchased divers several Coppholds from several Coppholders by several Copies whereof he died seised; Or committed several Offences by which he forfeited to the Lord all his Coppholds, for which the Lord seised, and granteth them again to his Ancestors with the Ancient Rent, and to his Heirs, Tenendum per antiqua servitia & consuetudine, &c. And afterwards, the same Coppholder committeth Waste, whether the same shall now trench to forfeit all the Copphold Lands which were granted ut supra, by one entire Copy; Or only that which was before the seizure holden by the same Rent, Et nihil ultra: For these words, Tenendum per antiqua servitia, do not trench only to the Quantity of the Services, but also to the Quality; scil. severally, so as there shall be several Services as before: As if A. be seised of Copphold Land on the part of his Father, and of other Copphold Land on the part of his Mother, and thereof dieth seised, and his Son and Heir be admitted to it by one Copy, and by one Admittance; Now if that Son dieth without Issue, the Coppholds shall descend severally, the one to the Heir on the part of his Father, and the other to the Heir on the part of his Mother, &c. And afterwards the Jury found the Special Verdict, and the special matter, ut supra, &c.

1 Roll. 508.

Trin. 26 Eliz. In the Exchequer.

CLIX. Vincent Lee's Case.

1 Inst. 138. b.

Vincent Lee seised of Lands in Fee, had Issue 3 Sons, F. G. and J. and by his last Will in writing Devised, That J. his Son should have the Land for the Term of 31 years, without impeachment of Waste, to the intent that he pay certain Debts and Legacies set down in his said Will, The remainder after the said Term expired to the Heirs Males of the Body of the said J. begotten. And further willed, That if the said J. die within the Term aforesaid, that then G. his Son shall have such Term, &c. and then also shall be Executor; but made the said J. his present Executor, and died, J. entered by force of the Devise: F. died without Issue, by which the Fee simple descended upon J. who had Issue P. and died within the Term, P. entered; G. as Executor entered upon him; and he re-entered; upon which re-entry, G. brought Trespass. Pigott said, That the Term by the descent of the Fee from F. to J. being the second Son of Vincent, and Heir of F. is not extinct, but only suspended. It hath been Objected, that J. cannot be said to die within the Term, because by the descent of the Fee, the Term is extinct, or suspended, and so not in esse at the time of the death of J. therefore nothing did accrue to G. because J. did not die within the Term: but that is but a Conceit; for the intent of Vincent was, that the Heir should not meddle with the Land Devised as Heir, until the 31 years be expired: and words, During, or Within the Term, extend unto the time of the Term, and not unto the Estate: And although, that the Term as to J. be extinct, yet the right or possession of G. shall stand, and shall be expectant upon the death of J. before the expiration of the said 31 years. As, A. leaseth for life to B. and afterwards granteth the Reversion with Warranty to C. who leaseth to B. in Fee, who is impleaded in a Praecipe: although now B. hath a Fee simple, yet during his life he shall not recover in value. And in the principal Case, This further Interest limited to G. cannot be extinct or prevented. See Plow. Com. *Welden and Elkington's Case*. Beaumont, contrary. And that the Term is extinct, because he hath the said Term in his own right, and not as Executor, but as a Man trusted with payment of Debts and Legacies; But the same Term which J. had, G. cannot have, for some of the years are expired; and the words of the Will are, He shall have such Term; but here the Term is utterly extinct: As where a Rent, Common, or Way, &c. descendeth upon the Tenant; 2 H. 4. A Prior had an Annuity out of a Parsonage, and afterwards he purchaseth the Abbotsdon, which is afterwards appropriated to his House; now the Annuity is extinct; and although the Prior afterwards presenteth to the Abbotsdon, yet it is not revived; Br.

Extinguishment

Extinguishment, 54. A Man hath a Lease for years as Executor, and purchaseth the Inheritance, his Term is exting, yet it is Assets, &c. And it is said in *Bracebridges Case*, *Plow. Com.* 419. 14. Eliz. that Parson, Patron and Ordinary, Lease for years the Glebe Lands of the Parsonage; the Parson dieth; the Lessee for years becomes Parson and dieth, his Executors shall not have the residue of the said Term; for the Term is exting, although he had the Term in his own right, and the Freehold in the right of his Church; and so in several Capacities. And it was holden by some, that if the Term for years comes to the Lessor as Executor, who dieth, the Term is revived. *Manwood*, Chief Baron, asked this Case of those who Argued; A Lease is made for 21 years, *Proviso*, That the Lessor shall suffer the Lessor to enjoy the same, or to take the profits thereof during the life of the Lessor, or so long as the Lessor shall live; if the same were a good *Proviso*, or not? *Pigeon* Conceived, that the Devise to G. was a new Devise, and not dependant upon the first Devise to J. nor any parcel of it; but this second Devise to G. did take away the absolute Devise to J. before, and qualified it, so as it determined with his death. The words, Such Estate, shall be intended an Estate to G. to be granted from the death of the Testator. Land is Devise to A. and his Heirs, and he if dieth without Heir, that it shall remain to another; the same is no good Devise: But a Devise to one and his Heirs, and if J.S. dieth living the Devisee, B. shall have it; the same is good: for it is a new Devise, and an Estate created *de Novo*, and doth not depend as a Remainder upon the first Devise, or upon the first Estate devised; as the Case is, 29 *Ass.* 17. *Br. Condition*, 111. and *Devise*, 16. So here are several Estates limited, one to J. and another to G. which Estate of G. cannot be exting by unity of possession in J. These words, If he die within the Term, shall be construed for Effluxion of the time of 31 years, and not for the Termination of the Term. *Cooper*, Serjeant, to the contrary; J. took this Term as purchaser, and not as Executor, for that no Term was in the Testator. See 14 *Eliz. Dyer*, 309. *Granmer's Case*; G. shall have such Term and Interest as before I have willed unto J. *Manwood*, Such Term, that is to say, The Residue of the Term.

1 *Inst.* 338.b.
2 *Roll.* 472.

Now at another day, the Barons delivered their Opinions, that the Plaintiff should recover, and that was now G. to whom the second Term was devised; And by *Manwood*, in Construction of Wills, all the words of the Will are to be compared together, so as there be not any repugnancy between all the parts of the Will, or between any of them, so that all may stand; And the Intent of the Testator was, That his Son J. should have the Lands for 31 years, if he so long lived, and if he died within the Term, That G. his Son should have such Term. And he held, That the same was in J. an Estate by Limitation, and he could not sell it; nor could it be exting by Act in Law, or of the Law. It was a Lease deter-

determinable by his death, and so shall be the Lease of G. determinable upon his own death; and G. upon the death of J. within the Term, shall have the residue of the number of the years limited by the former Devise; scil. so many in number as were not expired in the life of J. who was first Executor to that special purpose. Gent, Baron, to the same intent; here he hath the same Term as Executor; and it is not like a Term devised, which the party hath as Legatee; but in our Case, he hath only authority in this Lease as Executor, and the Land was tied to the time and the Authority; and when the same determines in his person, then the Land departs from him to G. who was a special Executor to that purpose, as J. was before. And G. had not the same Term which J. had; but such a Term. Clerk, Baron, acc. And he said, that the Will was further, that if G. died before his Debts paid, and his Will performed; and the Jury finding all the special matter, concluded, that if the Term limited to J. be extinct, then they find for the Defendant. And he held clearly, that J. had this Term of 31 years as Executor, and that by the descent of the Inheritance to J. the Term as to himself was gone: But as to Creditors and to the Legatees, it shall be said in esse, and be Assets in his hands: And because that the Term as to that purpose shall be said in esse, he died within the Term, within the intent of the said Will. And this word, Term, is, Vox polysema, Terminus status, Terminus temporis, Terminus loci. And in our Case, the word, Term, hath reference to time, and not to estate; for the Testator did respect the time in which his Will might be performed, and that was 31 years; as if I make a Lease during the Term that J.S. hath in the Manor of D. and J.S. hath 40 years in it; now although that J.S. surrendreth or forfeiteth it, yet he shall hold over, but he shall have it for 40 years; for my Lease refers to the time, and not to the estate. In the like manner here, G. cannot have the same Term which J. had, nor for 31 years after the death of J. but so much of the said 31 years shall be cut off in the interest of it, as J. had enjoyed it; and G. shall have as many years as J. hath left; and G. shall perform so much of my Will as J. at his death within the Term aforesaid shall not have performed: As if I Lease my Land to one until he hath levied 100 l. and if he dieth before that he hath levied it, then J.S. shall have such Term for the levying of it: the first Lessee levieth 50 l. and dieth, J.S. may levy the residue, but not the whole. And although that the Jury saith, that if the Term be extinct, then they find for the Defendant; although that it be extinct, yet they are not to take Cognizance what the Law is thereupon: but that is the Office of the Judges. As 13 E. 3. the Jury found, that the Son was born during the Elopement, and so Bastard; that Conclusion of the Verdict is not to the purpose, but the Court ought to judge upon the premises of the Verdict, If upon the birth, during the Elopement, the party be Bastard or not? And afterwards, Manwood, with the

the assent of his Companions the Barons, Commanded, That Judgment should be entred for the Plaintiff; Which was done accordingly.

Trin. 26 Eliz. In the Exchequer.

CLX. The Bishop of *Brislow's* Case.

NOte, It was holden by Manwood, Chief Baron, in this Case, That if a Lease be made for years rendring Rent, with Clause of Distress; And afterwards, the Rent and Reversion are extended upon a Statute, or seized into the Kings hands for Debt; if the Lessee payeth the Rent according to the Extent, the same is not in any danger of the Condition, for that now the Lessee is compellable to pay it according to the Extent. 1 Cro. 398.
More Rep.
891.

CLXI. *Hill. 26 Eliz. In the Exchequer.*

The Queen by her Letters Patents granted to J.S. catalla Utlagatorum, & Felonum de se, within such a Precinct; One who was indebted unto the Queen, is seilo de se, within the Precinct. It was the Opinion of all the Barons, and so Ruled, That notwithstanding the Grant by the said Letters Patents, That the Queen should have the Goods for to satisfy her Debt. More Rep.
126, 127.

Pasch. 26 Eliz. In the Kings Bench.

CLXII. *Tuker and Norton's* Case.

The Case was; An Infant being in Execution upon a Condemnation in Debt, brought a Writ of Error: His Father and his Brother was his Bail: It was the Opinion of the Justices, That they two only should enter into the Recognizance, That the Infant shall appear; and that if the Judgment be affirmed, that they shall pay the Bond, and not that they shall render the Body of the Infant again to Prison: for that, when once he is discharged of the Execution, he shall never be in Execution again.

Mich. 27 Eliz. In the Common Pleas.

CLXIII. *Marsh and Jones's Case.*

2 Len. 117.

IN a Replevin, the Case upon the Evidence was, That before the Statute of Quia emptores terrarum, A Man made a Feoffment in Fee to hold of him by the services, Solvend. post quamlibet vacationem five alienationem, the value of the annual profits of the Lands, &c. It was holden by the Court, That value shall be intended, which at the time of the Feoffment was the value, and not as it is now improved by success of time.

Mich. 27 Eliz. In the Common Pleas.

CLXIV. *Annesley and Johnson's Case.*

IN an Ejectione Firme, upon Evidence, the Case was, That Roger Wake was seised, &c. and before 27 H. 8. enfeoffed certain persons to his use, &c. and they being so seised to the use aforesaid, The said Roger by his Will willed, That his Feoffees and Executors should found a Chauntry in perpetuity, and a Priest there, to say Mass pro anim', &c. and that they procure a Licence to alien in Mortmain, and also an Incorporation for such Chauntry Priory; And that the said Lands should be conveyed to such a Priest, &c. And also that every such Priest should be School-Master there; And that post dictam Cantariam sic fundatam & stabilitam, the said Priest should say Mass, &c. Roger Wake died: The Feoffees and Executors did not procure any Incorporation, or Licence to alien in Mortmain, nor make any estate to the Chauntry Priest: But the appointing a Priest who said Mass according to the Will of the said Roger, and was also a School-Master, and took the profits of the said Lands as owner of them, and died: After which, one Vere was appointed to be School-Master there, but he was merely a Lay-person, and so continued until his death, and took the profits of the Land: And upon part of the Land he built a House, and there dwelt, and kept a School. And after his death, one Curtis was appointed by the Executors to teach there, and he was a Lay-man, and there taught many years; and afterwards he took Orders, and became a Priest, and said Mass, and other Divine Service, and continued School-Master also: And 26 H. 8. the same was presented for a Chauntry for First-Fruits, and first-fruits were paid for it, as appeared by a Particular which was shewed in Evidence. And also, 2 E. 6. it was presented for a Chauntry, and the possessions of it seised into the Kings hands. And it was much insisted upon, That Vere being a meer Lay-man, that the same was a forcible Interruption of the Reputation of the Chauntry. But it was the Opinion of the whole Court to the contrary:

contrary: And that notwithstanding, That no Corporation was obtained, yet because that the Priest was appointed by colour of the Will, and he said Hais according to the Will, although Vere who succeeded him was a meer Lay-man, and not a Priest; yet afterwards when Curtis came being appointed but a School-Master, being also a meer Lay-man, yet afterwards when he took up on him Orders, and demeaned himself as a Chauntry Priest there racione institutionis by the Will of Wake, which is confirmed by the Certificate, and also by the Presentment; The first Reputation is revived, and the Law shall not construe, That Curtis took the profits in the Quality of a School-Master, but as a Priest; for the Law hath respect to the Will of the said Wake, which was the ground of all these proceedings, and that, although he did not say Hais within 5 years before the Statute of 1 E. 6. And Note, That the Certificate of 26 H. 8. was, That Rich. Curtis was Cantarista: And it hath always been adjudged, That a Chauntry by Reputation is within the Statute of 1 E. 6.

Trin. 27 Eliz. In the Common Pleas.

CLXV. *Brian and Cawfen's Case.*

IN Trespals by Brian and his Wife and others, against Cawfen; 2 Len. 68.
It was found by Special Verdict, That W. Gardiner was seised in Fee according to the Custom of the Manor of C. of certain Lands, and surrendered them to the use of his last Will, by which he Devised them in this manner; scil. I Bequeath to Jo. Th. my House and Lands in M. called *Lacks* and *Stone*; To Ste. Th. my House and Lands called *Stokes* and *Newmans*; And to Roger Th. my House and Lands called *Lakins* and *Brox.* Moreover, If the said Jo. Ste. or Roger, live till they be of lawful age, and have Issue of their bodies lawfully begotten, Then I give the said Houses and Lands to them and their heirs in manner aforesaid, to give and sell at their pleasure. But if it fortune one of them to die without Issue of his body lawfully begotten, Then I Will, that the other Brothers or Brother have all the said Houses and Lands in manner aforesaid; And if it fortune the Three to die without Issue in like manner; Then I Will, That all the said Houses and Lands be sold by my Executor or his Assignee, and the Mony to be given to the Poor. The Devisor dieth, Jo. Ste. and Roger are admitted according to the intent of the Will; Roger dieth within age without Issue; John and Ste. are admitted to his part; John comes of full age, and hath Issue J. and surrenders his part of the whole, and his estate therein, to the use of Ste. and his heirs; who is admitted accordingly. Ste. comes of full age, John the Father dieth; Ste. dieth without Issue; J. the Son as Cosen and Heir of Ste. is admitted according to the Will, and afterwards dieth without Issue; The Wives of the Plaintiffs are heirs to him, and are admitted to the

Lands called Lacks and Stone, and to the moiety of the Lands called Lakins and Brox, parcel of the place where, &c. *prætextu quorum*, they enter into all the Lands where the Crespas is done. And it was found, that A. the Executor died Intestate; And that Cawfen the Defendant is Cosen and Heir to the said Debisor, and that he as Heir entred and did the Crespas.

First, It was agreed by all, That by the first words of the Will, the 3. Devisees had but an Estate for life: But Fenner and Walmesley who argued for the Plaintiffs, Conceiv'd, That by force of the later words, *scil.* If the said John, Stephen, and Roger, live till they be of lawful age, and have Issue of their body lawfully begotten, Then I give the said Lands and Houses to them and their Heirs in manner aforesaid, &c. They have Fee; and the words, In manner aforesaid, are to be referred not unto the Estate which was given by the first words which was but for life, but to make them hold in severalty as the first Debisor willed, and not jointly, as the words of the second Devise purporteth. And Fenner said, It hath been Resolved by good Opinions, That where a Fine was levied unto the use of the Conusor and his Wife, and of the Heirs of the body of the Conusor, with others Remainders over; Proviso, That it shall be lawful to the Survivor of them to make Leases of the said Lands in such manner as Tenant in tail might do by the Statute of 32 H. 8. although those Lands were never Demised before the Fine, yet the Survivor might demise them by force of the Proviso, notwithstanding the words, In manner, &c. So if Lands be given to A. for life upon Condition, the Remainder to B. in manner aforesaid; these words, In manner aforesaid, refer unto the Estate for life limited unto A. and not unto the Condition, nor unto any other Collateral manner.

The words, If they live until they be of full age, and have Issue, are words of Condition, and shall not be construed to such purpose, to give to them by Implication an estate tail: For the words subsequent are, That they shall have them to them and their Heirs, to give and sell at their pleasure. By which it appeareth, That his intent was not to make an estate tail; For Tenant in tail cannot alien or dispose of his estate, &c. And as unto the last words, And if it fortune they three to die without Issue, &c. these words cannot make an estate tail, and the express Limitation of the Fee in the first part of the Will, shall not be controverted by Implication out of the words subsequent. As if Lessee for 40 years Deviseeth his Lands to his Wife for 20 years, and if she dieth, the remnant of the Term unto another; although, that she survive the 20 years, she shall not hold over: and here the second sale appointed to be made by the Executor, shall not take away the power of the first sale allowed to the Devisee's after Issue. Snagg and Shurtleworth, Serjeants, to the contrary; And they Conceiv'd, That the Defendant hath right to two parts; for no express Inheritance beas in the Devisees until full age and issue; and because two of the Devisees

Devises died without Issue, they never had any Inheritance in their two parts, and so those two parts descended to the Defendant as Heir to the Devisor, no sale being made by the Executor. These words, If John, Stephen, and Roger, are to be taken distributive; viz. If *John* live, &c. are to be taken distributive; If *John* live until, &c. he shall have the Inheritance in his part; and so of the rest. As if J. have right unto Land which A.B. and C. hold in Common, and J. by a Deed release to them all, the same shall enure to them severally, 19 H. 6. And here, these later words, If these three do die without Issue, by that they conceived, The same to be but an estate in tail. And see to that purpose, 35 Aff. 11. 37 Aff. 15. For a Man cannot declare his intent at once, but in several parts; all which make but one sentence. And so it is said by Persay, 37 Aff. 15. We ought to have regard upon the whole Deed, and not upon parcel. And see Clark's Case, 11 Eliz. Dyer, 330, 331. And it was said, If I give Lands to one and his Heirs so long as he hath Heirs of his body, it is a Fee simple determinable, and not an estate in tail. Quare of that. Then here the Fee simple is determined by the death of the Devises without issue, and therefore the Land ought to revert to the Heir of the Devisor, especially being no person in rerum natura, who can sell, for the Executor before sale by him made, died Intestate; and if he had made an Executor, yet the Executor of the Executor could not sell. Which see, 19 H. 8, 9 & 10. And afterwards Resolved; That no estate tail is created by this Will, but the Fee simple settled in them, when they came at their lawful age, and had Issue; so as the residue of the Devise was void, and Judgment was given accordingly.

Mich. 27 Eliz. In the Common Pleas.

CLXVI. Griffith and Agard's Case.

IN Disceit by Griffith against Agard and his Wife; For that a Fine was levied of a Messuage, being Ancient Demesne, by which it became Frank-Fee; and the Fine was levied in the life of A. Griffith, Grandfather of the Plaintiff: Exception was taken to the Writ, because it is brought by the Plaintiff as Cousen and Heir of A.G. his Grandfather; And in the beginning of the Writ, the words are, Si Henricus Griffith fecerit te securum; without saying, Cousen and Heir of A.G. fecerit te securum. But the Exception was not allowed; For afterwards in the Writ, these words are, Cujus haeres ipse est. See the Register, 238. that it is sufficient, if there be in the body of the Writ, these words, Cujus haeres ipse est.

Another Exception was taken to the Declaration, in that it is alledged, that the Lands were, De antiquo Dominico Dominae Reginae Angliae; whereas it ought to have been, De antiquo Dominico

nico Dominae Coronae suae, &c. The Opinion of the Court was, That it was good both ways. See Book Entries, 100. *antiquo Dominico Corona*, & 58. *de antiquo Dominico Domini Regis.*

Mich. 27 Eliz. In the Kings Bench.

CLXVII. *Bashpool's Case.*

2 Len. 101.
Stiles Rep.
148.

The Case was, The Father was seised of Lands in Fee, and bound himself in an Obligation; and devised his Lands unto his Wife, until his Son should come to the age of 21 years, the Remainder to his Son in Fee, and died, and no other Land descended or came to the Son from the Father. It was moved by Godfrey, That the Heir in this case might elect to waive the Devise, and to take the Land by Descent. See 9 E. 4. 18. by *Needham*. But it was the Opinion of Gawdy and Shute, Justices, That the Son should be adjudged in by Descent; and so bounden with the Debt.

Mich. 27 Eliz. In the Kings Bench.

CLXVIII. *Branthwait's Case.*

Debt brought by J. D. against Branthwait upon an obligation; the Condition of which was, That whereas J. F. claimed to have a Lease for years of the Mannor of D. made and granted to him by one W. D. If the said Branthwait keep without damage the Plaintiff, from all claim and Interest to be challenged by the said J. F. de tempore in tempus during the years, &c. and also deliver the said Lease to the Plaintiff, that then, &c. The Defendant pleaded, That the said J. F. had not any such Lease, and that after the making of the said Obligation, untill the Action brought, the Plaintiff was not damnified *ratione dimissionis praedictae*. Exception was taken to the same, because, where the words of the Condition are, Keep without damage the Plaintiff from all Claim and Interest: And he hath pleaded, That the Plaintiff was not damnified *ratione dimissionis*, &c. But the Exception was disallowed by the Court; for if he were not damnified *ratione dimissionis*, then he was not damnified by reason of any Claim or Interest. Another Exception was taken, Because he could not now say, there was no such Lease: for it is recited in the Obligation, That J. F. claimed to have a Lease: and therefore by this recital he is estopped, &c. And see where a Recital is an Estoppel, 8 R. 2. *Fitz. tit. Estoppel*, 283. 39 E. 3. 3. *Fitz. Estoppel*, 112. 46 E. 3. 12. It was holden by the Court, That it was a good Estoppel. And afterwards, Judgment was given for the Plaintiff,

2 Len. 11.

CLXIX.

CLXIX. Mich. 27 Eliz. In the Kings Bench.

DEbt upon an Obligation; The words of the Obligation were; I am content to give to W. 10 l. at Michaelmas; and 10 l. at our Lady day. It was holden by the Court, That it was a good Obligation: And it did amount to as much as, I promise to pay, &c. It was also holden by the Court, That an Action of Covenant lay upon it, as well as an Action of Debt, at the Election of the Plaintiff. And it was holden, That although the Action is for 40 l. and the Declaration is 20 l. and 20 l. at two several days; yet it is good enough, and the Declaration is well pursuant to it: And afterwards, Judgment was given for the Plaintiff.

Trin. 27 Eliz. In the Common Pleas.

CLXX. The Queen and Kettell's Case.

The Queen brought a Writ de Valore Maritagii against Kettell, and Counted of a Tenure in Chief. The Defendant pleaded, That, pendant the Writ, the Queen had granted to one Edmund Kettel, Custodiam & Maritagium of the said Defendant, with whom he had Compounded. It was holden by the whole Court; to be no Plea; for the Letters Patents were void, because the Queen was deceived in her Grant: for it appeareth by the Count, that the Defendant before the Grant of the Queen, was of full age; And by the Letters Patents, the Queen intended that he was within age; and, by the same, granted Custodiam, &c.

CLXXI. Mich. 27 Eliz. In the Common Pleas.

A Seised of Land, by his Will Devised, That his Executors should sell the Lands, and died; the Executors levied a Fine thereof to one F. taking Money for it of F. The Question was, If in title made by the Conusee to the said Lands by the Fine, It be a good Plea against the same to say, Quod partes Finis nihil habuerunt? Anderson contended, That it was. But by Windham and Periam, upon Not Guilty, the Conusee may help himself, by giving in Evidence the special matter; in which Case the Conusee shall be adjudged in, not by the Fine, but by the Devise. And Windham said, That if A. Devise, That his Executors shall sell a Reversion of certain Lands of which he dieth seised, and then sell the same without Deed, the same is well enough; for the Conusee is in by the Devise, and not by the Conveyance of the Executors; Quod vide 17 H. 6. 23. And by Periam, The Conusee may help himself in pleading; As he who is in by the Frogment or Grant of Cestuy que use, by the Statute of 1 R. 3.

1 Len. 31.

1 Inst. 113. a.

Trin.

Trin. 27 Eliz. In the Common Pleas.

CLXXII. Lee and Loveday's Case

Tenant in tail leased for 60 years, and afterwards levied a Fine to Lee and Loveday, sur Conusans de Droit come eo, &c. and their Heirs in Fee: And afterwards, the Lord of the Mannor of whom the Land was holden, brought a Writ of Disceit, and upon that, a Scire facias against the Conusees, supposing the Land to be Ancient Demesne. The Defendants made default, by which the Fine was annulled, and now the Issue in tail entred upon the Lessee for years; and he brought an Ejectione firme. And it was found, that the Land was Frank-Fee. And the sole Question was, If by the Reversal of the Fine by the Writ of Disceit, without suing a Scire facias against the Ter-Tenant, should bind him? Atkinson, It shall not bind the Lessee for years; for a Fine may bind in part; and in part, not: as, bind one of the Conusees, and not the other. As, 7 H. 4. 11. a Fine levied of Lands part Ancient Demesne, and part at the Common-Law, and by a Writ of Disceit, the Fine was reversed in part; scil. as to the Land in Ancient Demesne; and stood in force for the Residue. See 8 H. 4. 136. And there by the Award of the Court, issued a Scire facias against the Ter-Tenant; And the Justices would not admit of the Fine without Certificate that the Land is Ancient Demesne, notwithstanding that the Defendant had confessed it. But as to those which were parties to the Fine, the Fine was become void between the parties; and he who had the Land before, might enter. See 8 E. 4. 6. And it would be a great inconvenience, if no Scire facias, or other Process, should be awarded against the Ter-Tenant; for he should be dispossessed and dis-enherited without privacy or notice of it. Whereas upon a Scire facias he might plead matter of discharge, in bar of the Writ of Disceit, Release, &c. which see, Fitzh. Na. Br. 98. and so, although that the Fine be reversed; yet he may retain the Land. And he resembled the same to the Case of 2 H. 4. 16, 17. In a Contra formam Collationis against an Abbot; A Scire facias shall issue forth against the Feoffee: and by the same reason, here in this Case. And for the principal matter, he conceived, That the Fine should be awarded between the parties, but not against the Lessee. Kingsmill conceived, That a Scire facias brought against the parties only, was good enough; for they were parties to the Disceit, and not the Ter-Tenants, &c. it was Awarded.

CLXXIII. *Trin. 27 Eliz. In the Kings Bench.*

ERror was brought upon a Judgment in a *Quid juris clamat*: It was assigned for Error, That the Tenant appeared by Attorney; which Act he ought not to do in his own proper person, if it be not in case of necessity; where in such case an Attorney may be received by the Kings Writ, and plead matter in bar of the Attornment. As if he claim Fee, &c. or other peremptory matter, after which Plea pleaded, he may make an Attorney, 48 E. 3: 24. 7 H. 4. 69. 21 E. 3. 48. 1 H. 7. 27.

Another Error was assigned, Because it is not shewed in the *Quid juris clamat*, what estate the Tenant hath. Another matter was, If the Grantee of the estate of Tenant in tail after possibility of Issue extinct, should be given to Attorney? And conceived, he should not, Because the privilege passeth with the Grant. See 43 E. 3. 1. Tenant in tail after possibility of Issue extinct, shall not be given to Attorney, 46 E. 3. 13. 27. therefore neither his Grantee: *Post. 241.* Williams, contrary, As to the appearance of the Tenant by Attorney, because the same is admitted by the Court, and the Plaintiff, the same is not Error. Which see, 1 H. 7. 27. by Brian and Conisby, 32 H. 6. 22. acc. And he conceived, That the Grantee should be given to Attorney; For no other person can have the estate of the Tenant in tail after possibility of Issue extinct, but the party himself, therefore not the privilege: And although he himself be punishable of Waste; yet his Grantee shall not have such privilege; As if Tenant in Dower, or by the Curtesie, grant over their estates, the Heirs shall have an Action of Waste against the Grantees for Waste done by the Grantees. But if the Heir granteth over the Reversion, then Waste shall be brought against the Grantees. See Fitzh. Na. Br. 57. And if two Coparceners be, and one taketh Husband, and dieth, the Husband being Tenant by the Curtesie, A Writ of Partitioe facienda lieth against him; but if he granteth over his estate, no Writ of Partition lieth against the Grantee. 27 H. 6. Statham, *Aid*; Tenant in tail after possibility, &c. shall not have Aid, but his Grantee shall. Clark conceived, That the Grantee should not be given to Attorney: If the Tenant in tail grant all his estate, the Grantee is punishable of Waste: So if the Grantee grant it over, his Grantee is also punishable. It was Adjourned.

CLXXIV. *Trin. 27 Eliz. In the Kings Bench.*

Hob. Rep.
66.

IN an Action of Trespafs against J.D. for breaking of his Close, &c. The Defendant pleaded, That the Trespafs whereof, &c. was done by the Defendant, and one J.S. against which J.S. the Plaintiff at another time had brought an Action of Trespafs, and Recovered, &c. and had Execution of the Damages, &c. Plowden said, It was a good Bar, for that all is but one Trespafs; and satisfaction by one of the Trespaffors, is satisfaction for the other: And if the Plaintiff had Released to the other Trespaffors, the Defendant if he had it in his hand might well plead it. Wray conceived it a good Bar; For it is but one Trespafs and one wrong, although in respect of the several persons of the Trespaffors, there are several Corporal Acts. Atkinson conceived, That the Bar was not good; and it is not like the Case of Release, for that taketh away the whole Trespafs whosoever doth it: And this Action may be sued jointly or severally against the Trespaffors: and when the joint suit is Released, the several suit is Released. Clench, If an Action of Trespafs be brought against two, and they plead several Pleas, and afterwards one of them is found guilty by a several Jury, That Jury shall assess all the Damages; and if the other be afterwards found guilty, he shall be subject to the said Damages, although he was not party to the said Jury: and by the same Reason that he shall be charged with the same Damages, by the same Reason he shall have advantage of the satisfaction of them made by his Companion, See *Br. Trespafs*, 2.

Trin. 27 Eliz. In the Kings Bench.

CLXXV. *Hitchcock and Thurland's Case.*

IN an Action upon the Statute brought for taking of Lands to Farm by a Spiritual person, 21 H.8. It was holden, That if any such Lease be made at this day to any Spiritual person, such a Lease is not void: But such a Lease extends to such Leases made before the Feast of St. Michael mentioned in the said Act, and not aliened before the said Feast, &c. And so it was said, It was lately adjudged in one Underwood's Case.

Trin.

Trin. 27 Eliz. In the Kings Bench.

CLXXVI. *Cutter and Dixwell's Case.*

AN Action upon the Case brought by Cutter against Dixwell : for that the said Defendant had exhibited a Bill to the Justices of Peace against the Plaintiff, containing, That the Plaintiff is an Enemy to all Quietness, seeking all means to disquiet his Neighbors, and hath used himself as a Lawless person ; and having Process to serve upon one in the Parish ; viz. the Parson, did keep the Process, and would not serve it but on the Sabbath day in the time of Divine Service, not having regard to her Majesties Laws, or the Quiet of his Neighbours. Upon which Bill, the Justices to whom it was exhibited, awarded Process against the Plaintiff, to find Sureties for his good behaviour. It was the Opinion of the Justices, That upon this matter, an Action would not lie.

Trin. 26 Eliz. In the Kings Bench.

CLXXVII. *Mason's Case.*

MASON Leased certain Lands to one R. for years ; and afterwards leased the same Lands to one Tinter for years ; Tinter Covenanted with the Defendant, That if the said R. should sue the said Mason by reason of the later Lease, that then he would discharge or keep harmless without damage the said Mason, and also would pay to him all the Charges which he should sustain by reason of any suit to be brought against the said R. in respect of the said former Lease : And Mason by the same Indenture Covenanted with Tinter, That the said Land demised, should continue to the said Tinter discharged of former Charges, Bargains, and Incumbrances : And now upon the second Covenant, Tinter brought an Action of Covenant, and shewed, That the said R. had sued him in an Action of Ejectione Firme upon the said first Lease, and had recovered against him, &c. And Mason pleaded in Bar, the said second Covenant, intending that by that later Covenant, the Plaintiff had notice of the said former Lease made unto R. so as the first Lease shall be excepted out of the Covenants of former Grants ; for otherwise, there should be circuitry of Action. But the Opinion of the whole Court was to the contrary : For the Covenant of Mason shall go to the discharge of the Land ; but the Covenant of Tinter only to the possession.

Pasch. 27 Eliz. Rott. 1127. In the Common Pleas.

CLXXVIII. Knight and Beeches Case.

1 And. 173.
Coke 5. Rep.
55.
1 Len. 12.
2 Len. 134.

William Knight brought Ejectione Firme against William Beech. The Case was, That the Prior of St. Johns of Jerusalem, 29. H. 8. with the assent of his Covent, leased by Indenture divers Houses in Clarken-well, in the County of Middlesex, for fifty years, to one Cordel, rendring Rent 5 l. 10 s. and 11 d. at four Feasts of the year, usual in the City of London, viz. for such a Messuage, called The High-House, 14 s. for another House, 3 s. 11 d. for another House, xx s. &c. Et si contingat dictum annualem redditum, 5 l. 10 s. 11 d. a retro fore, in parte vel in toto, ultra aut post aliquem terminum solutionis, in quo solvi deberet, per spatium trium mensium, &c. quod tunc, & ad omnia tempora deinceps, ad libitum, &c. liceret dicto Priori, & Successoribus suis, & omni tali personæ & personis, quam vel quas dictus Prior & Successores sui nominarent & appunctuarent, sine scripto, in omnia dicta tenementa totaliter re-entrare, &c. And afterwards, 32 H. 8. the said Hospital of St. Johns was dissolved, and the possessions of it granted to the said King; and afterwards the said King, 36 H. 8. gave the said House, upon which the said Rent of 20 s. was reserved, to one Audley, &c. in Fee: And afterwards the now Queen being seised of the residue, a Commission issued out of the Exchequer bearing Date 8 Maii, 23 Eliz. Ad inquirendum, Utrum the Defendant to whom the Interest of the said term did appertain, perimplevisset & performasset omnes Provisiones fact. & reservat. in & super prædict. Indenturam, necne? Office was found before the Grant, and after 25 August following, the said Queen, by her Letters Patents, gave the said House, called The High-House, to Fortescue the Lessor of the Plaintiff; and afterwards Tres Mich. the Commission was returned, by which it was found all as aforesaid; Et quod Termini & Festi Solutionis in London, are Michaelmas, Christmas, Annunciation, and Midsummer; and that at the Feast of Michaelmas, such Rent was behind for the space of three Months, &c. It was argued in this Case by Gawdy, Serjeant, on the part of the Plaintiff, That here are several Rents; for the entire Sum by the viz. is distributed into several Portions, which make several Rents; and to that purpose he cited Winter's Case, 14 Eliz. Dyer, 308. A Lease for years is made of the Mannors of A. B. and C. rendring for the Mannor of A. 11 s. and for the Mannor of B. 1 s. and for the Mannor of D. 1 s. with a Condition for the Non-payment of the said Rents, or any of them, or any part or parcel of them, within one Month, &c. then a Re-entry; Here are several Rents: And he conceived, That a Condition in the Case of the King might be apporportioned; For a Rent charge, and a Condition, are in the King in better

better Condition than in a Subject, for the thing may distrain for a Rent-charge in all the Lands, of him who is seised of the Land out of which such a Rent is issuing; and if a Rent-seck be due to the King, he may distrain for the same; and the King shall never demand his Rent which he hath reserved with Clause of Re-entry; and it appeareth in the Register, That if before the Statute of Westm. 3. the King purchaseth parcel of the Land holden of him, the Rent shall be apportioned, which was not in the Case of a Common person, and there are in the Exchequer divers Presidents to that effect, scil. If A. be bounden in a Recognizance to B. and afterwards enfeoffeth the King of part of his Land, and C. of the other part: If B. be afterwards attainted of Treason, so as the said Recognizance accueth to the King; that notwithstanding that he hath part of the Land payable to the Recognizance, he shall have Execution of the residue. And see F. N. B. 266. If, after the Recognizance acknowledged, the Conusor enfeoffeth of certain parcels of his Lands several persons, and of the Residue enfeoffeth the King; that Land which is assured to the King is discharged of the Execution, but the residue shall be charged: So that the possession of the King doth alter the Nature of the Rent, Condition, and Execution. Fenner, Serjant, Contrary. And he said, That this Grant before Office returned was not good; for without Office the King cannot enter, multo minus his Patentee; and that the King by the Grant hath interrupted the Relation of the Office, As if a Man by Indenture bargaineth and selleth his Lands, and afterwards makes Libery to the Bargainee, and afterwards the Deed is enrolled. Now the party shall not be said to be in by the Bargain and Sale, but by the Libery; for the Libery hath interrupted the force of the first assurance by way of Bargain, and the Relation is utterly gone: So in our Case, The Grant of the Queen, mean between the Award of the Commission, and the Return of it, hath destroyed the force and effect of the Commission, so as no appearance shall be had of it: And he agreed, That here are several Rents, but the Condition is entire; and admit, that a Condition may be apportioned in some Cases, yet in some Cases it cannot. And the Statute of 32 H. 8. gives the Condition and the Reversion, to which it is annexed, to the King, in such sort as it was in the Prior: But the Condition in the Prior was not capable of Apportionment, and therefore no more it shall be in the Case of the King. As where a Recognizance is acknowledged, which cometh to the King by the Attainder of the Conusor; Now, if the King will sue Execution upon it, he shall not have the whole Land of the Conusor in Execution, but only the moiety by Elegit, &c.

This Case afterward, Trin. 28 Eliz. for Difficulty, was adjourned into the Exchequer-Chamber, and there argued before all the Justices, and Barons of the Exchequer. And Shuttleworth, Serjant, argued for the Plaintiff; And first he said, There are several Rents,

Rents, and so several Conditions, especially when all the things demised are of such a Nature, that they may yield a Distress: but if any of the things demised cannot yield Distress, then it shall be one entire Rent, and shall issue out of the Residue, &c. Which see, 17 Aff. 10. An Assise was brought of 20 s. Rent, and the said Rent was reserved upon a Lease for life made of 100 Acres of Lands, and 15 Acres of Wood; scil. for the Land 10 s. and for the Woods 10 s. And by the Assise it was found the Disseisin in the Wood, but not in the Land. Wherefore it was awarded, That the Plaintiff should recover seisin of the 10 s. and for the residue, that he should take nothing. And although these words (reddendo inde) Trench unto all the things demised entirely, yet this word (viz.) is a distributive, and makes an Apportionment; And the viz. is not contrary to the premises; scil. to the reddendo inde. As if I enfeoffe A. and B. of an Acre of Land, Habendum the one moiety thereof to A. in Fee, and the other moiety to B. in Fee; this is good, for it well stands with the premises. But if I enfeoffe A. and B. of two Acres of Lands, Habendum the one Acre to A. and the other to B. the same Habendum is void, because contrary to the premises, for each of them is excluded out of one Acre which was given to him in the premises. And in our Case, If the Rent set forth in the (Viz.) had been greater or less than that which is reserved upon the Reddendo, then the (Viz.) should be void for the contrariety, and the Reddendo stand. *Walmesley*, contrary; And that here is one entire Rent. Which see to be so, by the close of the Condition, *Si Redditus prædict' aut aliqua inde parcella, &c.* And the Lessor may distrain in any part of the Land demised for the whole Rent, notwithstanding the (Viz.) And it was moved by *Shuttleworth*, That admit the Rent and Condition be entire; Yet now when the King grants the Reversion of one of the things demised in Fee to a stranger, the Condition remains, and not determined by the destruction of the Reversion, as in the case of a Subject: For the King hath divers Prerogatives, by which he is exempted and protected from such Mishiefs and Inconveniences which happen to Subjects by their own Acts and their Laches and Folly, which shall not be imputed to the King; And the reason of Extinguishment of a Condition in such case in the case of a Common person, is his own Folly, that he will distrahere his Reversion; And Folly shall never be imputed to the King: And as the Case is here, the King is not bound to take notice of a Condition made by a Common person; For it is not matter of Record, and by this Grant of the King, the Rent doth not pass; for the Grant is only of the Reversion, without any mention of the Rent. And the King hath divers Prerogatives in a Condition; As in the creating of a Condition, 35 H. 6. 38. The Abbot of *Sion's Case*, *Ad effectum*, is a good Condition in the Case of the King, by *Prison*: And where the King grants Lands in Fee to one upon Condition, That the Grantee shall not alien, the same is a good

good condition. So for a Rent Seck, the King may distrain; And the King may reserve a Rent and a Condition to a stranger; and if he doth reserve a Rent and a Condition to himself, he may grant the same over to a Subject, 2 H. 7. 8. And the Condition in the case of a Common person may be apportioned: As if Lessee of two Acres upon Condition, alien one of them in Fee, and the Lessor entreth for the forfeiture, or recovereth part in an Action of Waste, &c. but of a surrender, it is otherwise. Walmesley contrary; The Condition is gone; For a Condition in the hands of the King is of the same Nature, as in the case of a common person, impatient of any Division, Partition, or Apportionment: As, if the King hath a Rent out of 3 Acres of Land, and afterwards purchase one of them, the Rent is utterly gone, and shall not be apportioned as well as in the Case of a common person: So of a Common. And as this Case is, If the Condition doth remain, then, upon the breach of it, the King shall enter into the whole; for the words of the Condition are, Wholly to re-enter; and so he should defeat his own grant. And he cited a Case adjudged at the Assizes at York; The King gave Land in Fee-Farm, rendering Rent, with Clause of re-entry: The King granteth the Rent over to a stranger; And after, the Rent is behind; The King cannot re-enter, nor the Grantee.

It was also moved, If the Jurors of Middlesex might enquire of the usual Feast days in London. Shuttleworth, That they might do so. See 5 H. 5. 23. Where a Commission issued out to enquire in the County of Surrey, of Escheats, words, &c. who found, that A. held of the King in Chief, and took to Wife one E. Coten of A. within the Degrees they then knowing of it, and had Issue betwixt them; and afterwards they were Divorced in the County of Kent, &c. And Exception was taken to that Office, Because the Enquest of Surry had found a Divorce in the County of Kent. Another matter was, Because the Jurors have found the breach of the Condition; And before the Jurors had put their Hands and Seals to the Inquisition, the Queen granted part of the things demised in his hands, to Fortescue; After which Grant, the Inquisition was sealed, and Returned into the Exchequer: If now, the Grant to Fortescue be good, or not? Vide inde, Dyer, 2 Eliz. 17. Upon a Writ of Mandamus, The Escheator charged the Enquest, who were agreed of their Verdict, and delivered the same in Paper to the Escheator; And, before the engrossing, sealing, and delivery of it, came a Superfedeas: And it was Resolved, by all the Justices, That before the engrossing, indenting, and sealing, it was no Verdict. See this Case Reported in Cook 5. Part, 54.

Pascb. 27 Eliz. In the Common Pleas.

CLXXIX. *Nelson's Case.*

IN Trespass brought by Nelson, chief Preignothorp of the Court of Common Pleas, the Case was, That the Abbot of D. was seised of a Common out of the Lands of the Abby of S. as appendant unto certain Lands of the said Abby of D. And afterwards the said Houses were dissolved, and the possessions of them given to the King by Act of Parliament, to have and hold in as large and ample manner and sozmas the late Abbots, &c. After which, the King so being seised, granted the said possessions of the said Abby of D. to A. and the possessions of the said Abby of S. to B. It was argued, That the Common, (notwithstanding the unity of possession) did continue; For unity of possession is so qualified and restrained by the Statute, by the words aforesaid, and also by the words (in the state and condition as they now be,) And the Abbot of D. was seised in the right of his House, of the said Common; Therefore so also shall be the King, and his Patentees; and so a special seisin is given to the King. Rhodes, Windham, and Anderson, Justices, to the contrary. And the said words in the said Statute are to be construed according to the Law, and no further; And by the Law, the said Common cannot stand against the Unity of possession.

Trin. 28 Eliz. In the Common Pleas.

CLXXX. *Leonard's Case.*

2 Len. 192.
2 Roll. 787.

Leonard, Custos Brevium, brought an Action of Trespass for breaking of his Close: The Defendant pleaded, That William Heydon was seised and enfeoffed him; And upon Necesse pass, they were at Issue. And it was found by Special Verdict, That the said William Heydon was seised, and leased to the Defendant for years, and afterwards made a Charter of Feoffment to him, by these words, Dedi & Concessi, with a Warrant of Attorny in it, and delivered the same to the said Lessee; who delivered the same to him who was made Attorny in the said Deed, who made Liberty accordingly. It was moved by the Plaintiff's Counsel, That here is not any Feoffment found, but only a Confirmation; For as soon as the Charter was delivered to the Lessee for years, the Law gave it its operation to that effect, to best the Fee in the Lessee by way of Confirmation. See Litt. 532. But the Opinion of the whole Court was clear to the contrary; For here the Lessee hath liberty, how and by what Conveyance he shall be adjudged seised of the Land, either by Feoffment, or by Confirmation: And it appeareth here, That when the Lessee delivered

liber the Charter to the Attorney; And also when the Lessee accepted Livery from the Attorney, he declared his meaning to be, That he would take by the Livery: And the Lord Anderson said, That if Tenant in tail be disseised, and makes a Charter Feoffment with a Warranty of Attorney, and delivers the same to the Disseisor, who delivers the same to the Attorney, who makes Livery accordingly, the same is a good Feoffment, and so a Discontinuance. And after many Motions, the Court awarded, That the Plaintiff should be barred.

Trin. 28 Eliz. In the Common Pleas.

CLXXXI. *Palmer and Waddington's Case.*

Richard Palmer brought an Action upon the Case against Anthony Waddington; And Declared, That Henry Waddington, Brother of the Defendant, was indebted to the said Plaintiff in 20*l.* Et jacens in extremis, & mortem indies expectans, vocavit ad se dict. *Anthonium* quem executorem Testamenti & ultimæ voluntatis Constituisset, cum rogans ut dictas 20 Libras præfato *Richardo* infra spacium duorum Mensium mortem suam proxime sequend. numeraret & solveret; Et dictus *Anthoni* in Consideratione inde super se assumpsit, &c. And all the matter aforesaid was found by Verdict, upon Non Assumpsit pleaded. And it was the Opinion of the whole Court, That the Declaration was insufficient, because there is not any good Consideration set forth in it; for it is not said, That in Consideration that the said Henry made the Defendant his Executor, &c.

Trin. 28 Eliz. In the Kings Bench.

CLXXXII. *Stransham and Collington's Case.*

The Plaintiff sued in the Spiritual Court for Tythes against the Defendant within the Parish of C. The Defendant said, That the Tythes are within the Parish of A. and the Parson of A. came in pro interesse suo, and thereupon they proceeded to sentence, and that was given against Stransham, who now sued a Prohibition: And the Question was, If within such a Parish or such a Parish, be tryable by the Law of the Land, or by the Law of the Church? Wray, Chief Justice, said, It hath been taken, That it is tryable by our Law. Fenner, The Pope hath not distinguished Parishes, but hath Ordained, That Tythes shall be paid within the Parish. 1 Cro. 128.

Mich. 28 Eliz. In the Common Pleas.

CLXXXIII. *Higham's Case.*

2 Len. 226.
 More Rep.
 221.
 1 Cro. 15.

1 Roll. 839.

IT was found by Special Verdict, That Thomas Higham was seised of 100 Acres of Lands called Jacks, usually occupied with a House; And that he Leased the said House, and 40 Acres of the said 100 Acres to J.S. for life, and made his Will; by which he devised the said House and all his Lands called Jacks, then in the Occupation of J.S. to his Wife for life: and that after the decease of his Wife, the Remainder thereof, and of all his other Lands appertaining to Jacks, to Richard his second Son, &c. It was said by Meade, That the Wife should not have by Implication the Residue of Jacks, for that she hath an express estate in the House, and 40 Acres of the Land; and her Husband having expressed his Will as to that, his Will shall not be construed by Implication to pass other Lands to the Wife. And it was said by him, That it had been adjudged in the Case between Tracy and Glover, That if Lands be devised to one and to his Heirs, and if he dieth without Heir of his body, that then the Land shall remain over; that in such case, the Donee hath but an Estate in tail to him and the Heirs males of his body.

And it was then also said by Anderson, Chief Justice, That in the time of Sir Anthony Brown, it was holden, That if a Man be seised of two Acres of Land, and devised one of them to his Wife for life, and that J.S. shall have the other Acre after the death of his Wife; that the Wife hath not any estate in the later Acre, for the cause aforesaid: Afterwards, It was moved, What thing passed to the second Son by that Devise? And the Lord Anderson conceived, That the words in the Will, Usually Occupied with it, did amount to as much, as Land let with it; and then the 60 Acres were not let with it, and therefore did not pass. Windham, Justice, held the contrary; and he said, Although they do not pass by the words, Occupied with it; yet it shall pass to the Son by the name of Jacks, or the Lands appertaining to Jacks, To which Anderson, mutata opinione, afterwards agreed.

Pasch. 28 Eliz. In the Kings Bench.

CLXXXIV. *Wroth and the Countess of Suffex Case.*

Co. 6. Rep.
 33.
 1 Len. 35.
 4 Len. 61.

The Case was this, In Anno 4 & 5 of King Philip and Queen Mary; A private Act of Parliament was made, by which it was Enacted, That the Manor of Burnham was assured to the Countess of Suffex for her Joynture; with a Proviso in the Act, That it should be lawful for the Earl of Suffex to map a Lease of Leases for 21 years; and afterwards, a year before the first Lease was

was ended, he made another Lease for 21 years, and this second Lease was to begin and take effect from the end of the first Lease. And if this second Lease were a good Lease within the intent and meaning of the Act, was the Question?

Popham, the Queens Attorney General said, That it was not;
1. Because it was a Lease to begin at a day to come: And, 2. Because it was made before the first Lease was ended. But he said, It may be Objected, That the Act saith (Lease or Leases,) It is not the sense of the Act, that he might make Leases in the Reversion: but the sense and meaning of the Makers of the Act, was, That he might make Leases in possession, and not Leases in futuro; for if it should be so, then he might make a Lease for 21 years to begin after his death: which should be a great prejudice to the Countess, and against the meaning of the Act, which was made for her advantage.

The Lord Treasurer, and Sir Walter Mildmay, Knight, have a Commission from the Queen to make Leases of the Queens Lands for 21 years, because the Queen would not be troubled. It was holden, That by virtue of that Commission, they could not make any Leases, but Leases in possession only: But all other Leases which did exceed the Term of 21 years, and in Reversion, were to pass by the hands of the Queen, and her Attorney General, and not by them only by virtue of their said Commission. And if I grant to one power before the Statute to make Leases of my Land for 21 years, he cannot make any Lease, but only Leases in possession; and he cannot Lease upon Lease, for by the same reason, that he might make one Lease to begin in futuro; by the same reason he might make 20 several Leases to begin in futuro; and so frustrate the Intent of the Act. It was Marshall's Case upon the Statute of 1 Eliz. of Leases to be made by Bishops; The Bishop of Canturbury made a Lease to him for one and twenty years; and afterwards he made a Lease unto another for 21 years to begin at the end of the first Lease. And it was holden, That the second Lease was void. But in the great Case which was in the Exchequer-Chamber, upon this Point, There the second Lease was in possession, and to begin presently, and to run on with the other Lease; and therefore it was adjudged to be good, because the Land was charged with more than 21 years in the whole. And if the Earl had done so here, it had been a good Lease. Wray, Justice, said, That if the second Lease had been made but two or three years before the expiration of the first Lease, that then it had been utterly void; but being made but 2 or 3 days or months before the expiration of the first Lease, he doubted, If it should be void, or not. The Statute of 32 H. 8. makes Leases for 21 years, to be good from the day of the date thereof: And a Lease was made to begin at a day to come: And yet it was holden by two of the Justices in the Court of Common Pleas, That it was a good Lease: And by two other Justices of the same Court, it was holden, the Lease was

not good. And Clench, Justice, said, That there was no difference, If it be by one Deed, or by two Deeds: And therefore he held, That if the Earl had made a Lease for 21 years, and with- in a year another, the same had been void, if it were by one Deed, or two Deeds, for that he did exceed his authority. And he said, In the principal Case, If there had not been a Proviso, he could not have made a Lease; and therefore the Proviso which gave a power to make a Lease for 21 years, should be taken strictly. There was a Case of the Lord Marquess of, &c. that it should be lawful for him to make Leases for 21 years by a Statute; And he made another Lease to begin after the end of expiration of the first Lease; and it was doubted, Whether it were a good Lease or not, because he had not made any Lease before: But if both were made by force of the Statute; all held, That the second Lease was void.

At another day, the Case was argued by Daniel, for the Lease in Reversion to begin at a day to come. And he said, That in a Statute the words alone are not to be considered, but also the meaning of the parties, and they are not to be severed. Also he said, That a Statute-Law is to be expounded by the Common-Law: And by the Common-Law, If one giveth power unto another to make Leases of his Lands, he might make Leases in Reversion, because an Authority is to be taken most beneficially for them for whose cause it was given. So that if a Man grant an authority to another to make Estates of his Lands, by those general words he may make Leases for years or for life, Gifts in tail, Feoffments, or any Estates whatsoever; If one gives a Commission to another to make Leases for one and twenty years of his Lands, he may make a Lease in Reversion; and so it was holden in the Dutchy in the Case between Alcock and Hicks. Also he said, That this Lease was a good Lease by the Statute-Law: For the Statute of Rich. 3. gives authority to Cestuy que Use, that he may make Estates in Reversion. The Statute of 27 H. 8. which gives authority to the Chief Officer of the Court of Surveyors to make Leases, if it had stayed there, he might have made Leases in Reversion; Therefore the Statute goes further, and saith, Proviso, That he shall not make a Lease in Reversion. See 19 Eliz. Dyer, 357. The Statute of 35 H. 8. of Leases to be made by the Husbands of the Lands of their Wives, By the general words of the Statute they might have made Leases in Reversion; And therefore the Case there was, That where the Husband had made a Lease of his Wives Lands for 21 years; and afterwards he made another Lease for 21 years, to begin after the Lease in esse: It was conceived, That such a Lease was good, because in the Act there was no restraint of Leases in Reversion, as there is in the Statute of 32 H. 8.

In all Cases of Statutes which are with Provisoes, the Law upon them shall be taken generally, but in such Particulars only as are restrained by the Proviso; and here in this Case, the Proviso

viso went to the Ancient Rent to be reserved, and that the Countess should have remedy for the said Rent; and therefore it shall be construed at large as unto all other points which are not restrained by the Proviso.

As if the Wife be within age, and she and her Husband joyn in a Lease, yet such a Lease shall be good, by the Statute of 32 H. 8. because the Law is general, and doth not restrain these imperfections expressly. So if a Feoffment in Fee be made with warranty, Proviso, That he shall not vouch; yet that restraint goes to the Coucher only, and he is at large to Rebutt, or to have a Warrantia Chartæ. A Lease is made for life, Proviso, That he shall not do voluntary Waste; he is at large to do any other Waste: Otherwise it would be, if there were no Proviso; and there a Proviso makes the precedent words to be expounded more liberally. The Statute of 33 H. 8. Cap. 39. of Surveyors, which giveth authority to the Chief Officer to let, or let for 21 years, he might have made a Lease for 21 years, if by the Proviso he had not been restrained; and yet the words are put singularly: But the words of this Act; upon which the Case in Question doth arise, are Lease or Leases; and therefore it shall be expounded most liberally for the party.

Again, he argued, That as to the intent of the Statute, that this Lease was within the meaning of it; for the meaning is to be collected out of the words, and shall not be drawn to any private construction or intent against the words, which should be here, if this Lease should be avoided: For by such construction and exposition, the Earl, his Heirs, Executors, &c. should be prejudiced; and the Countess only should be benefited. Also by this Act remedy is given to the Countess against such Lessees, that she should have the Rent, by Debt, or Distress; as if she had been party or party: therefore it is reason, *via versa*, that the Lessees have remedy against her for their Leases. Also he said, That the same remedy should be for them against the Countess, as they had against the Earl himself if he had been alive; and therefore they should have such remedy against the Countess, as they had against the Earl. And further he said, That the Statute is to be expounded according to the words where such an Exposition is not rigorous, nor mischievous: And private Laws are to be expounded by the letter, and strictly, as the Deed of the party shall be: As 14 E. 4. 1. Br. Parliament, 61. A Particular Act was made, That the Chancellor calling unto him one Justice, might award a Subpena between A. and B. and end the matter betwixt them: And there, by all the Justices, except Littleton, he shall not award a general Subpena, but a special Subpena, making mention of the Act; for he shall pursue the particular Act strictly: But an Act which is for the common profit, shall be expounded largely. Also a Statute shall not be expounded largely, or by Equity to overthrow an Estate: As the Statute which gives, That if the Woman doth consent to the Ravisher, that the next Heir shall enter: If the Daughter entereth; and after a Son is born; he shall not put out the Daughter, because

because the Statute shall not be drawn to a private intent, to the overthrow of the Estate before lawfully vested in the Daughter: And so in the principal Case, the Statute shall not be drawn to a private intent for the benefit of the Countess, to overthrow the Lease for years. And it is not like to the Case which hath been put, That if he maketh a Lease for 20 years, and so for 20 years; that the same is not good by the Statute; for I will agree, That that is a Lease for 40 years. Egerton, Solicitor, contrary; first, as to the word (Demise, or Dimission), It is nothing else but the letting of the Land, and so (Lease) comes from (*Laisier*) a French word; and such a Lease to begin at a day to come, is interesse of a Lease, and not a Lease it self, for he hath not left the Land. As if I say to you, I Let you my Lands for 21 years; When shall you have my Land? Not at a day to come, but presently. If I sell you Land, and Covenant, that it is discharged of another Lease for 21 years, and there is a Lease to Commence after the Lease for 21 years, I have broken my Covenant. If I be bounden to make you a Lease for 21 years, and I say to you, I make you a Lease to begin 200 years hence, I have forfeited my Bond. If the Custom of the Mannor be, that Dominus pro tempore may make a Lease for 21 years, may he make a Lease to begin at a day to come? Truly no, if there be not a special Custom so to do. If I give authority to my Steward to make Leases of my Lands for 21 years, he cannot make a Lease to begin 100 years after. As to the Case of the Duchy, there the Commission was, That he might make Leases according to his discretion, therefore there he might make what Lease he pleaseth. As to the Statute which enableth Cestuy que Use, of 1 R. 3. that Case is not like to our Case, for that Act is, All Feoffments, Estates, &c. therefore he might make such Leases without doubt. And if I devise, That my Executors shall make Leases of my Lands for 21 years, they cannot make Leases to begin at a day to come; and if they do not make the Leases within convenient time, the Heir shall enter, and avoid their authority.

And Statute Law shall have such an Exposition, as that the precise time ought to be observed; As the Statute of 14 E. 3. *Rastal Voucher*, 8. If the Tenant voucheth to warranty a dead Man, and the Demandants will aver, That the Vouchee is dead, or that there is no such, their Averment shall be received without more delay. Upon this Statute the Case was, 21 E. 3. Where one was vouched to warranty, and the Summons ad Warrantizandum issued, and then came the Demandant and would have averred, That the Vouchee was dead; And the Tenant said, That he ought to have averred that upon the voucher to warranty, and that now he had surceased his time: And the Demandant said, That the Statute did not bind him to that, nor did prescribe any time, but left the same generally. Yet it was the Opinion of the whole Court, That he should have the Averment at the time of the Voucher,

Toucher, or not at all. So the Statute of 11 H. 7. Cap. 20. If a Woman who hath a Joynture for life, or in tail, suffereth a Recovery, and afterwards the Issue in tail releaseth all his Right by Fine, and dieth, his Issue may enter; for the assent ought to be by Toucher in the same Action, or the like: for if there be a mean instant between the Recovery and the Assent, then any assent after is nothing to the purpose; for the Recovery being once void by the Statute, cannot be made good by an assent afterwards. See Doctor and Student, 54. And yet the Statute is, Provided, That the Statute shall not extend to any such Recovery, &c. if the next Heir be assenting to the same Recovery, &c. so as the same assent, or agreement be of Record, or inrolled. And it doth not say, That the Assent should be at one time, or at another. But to come to Leases upon Statutes. Before the Statute of 2 E. 6. Cap. 8. If Leases had not been found by Offices, the Lessees should have been ousted, and put to their traverse: But put Case, that after that Statute, a Lease made to begin at a day to come, were not found by Office, should it be helped by that Statute? No truly; And so it is holden in the Court of Wards at this day; and the Lord Chief Justice of England held so in his Reading at Lincoln's Inn.

The Statute of 1 Eliz. of Leases to be made by Bishops, is, That Leases other than for 21 years from the time that they begin; that is, when they may take effect as Deeds, and not when they shall take effect to be executed; For so they might make Leases infinite, &c. It was adjourned, &c.

Mich. 28 & 29 Eliz. Rot. 2494. In the Common Pleas.

CLXXXV. *Lewen and Mody's Case.*

IN a Replevin brought by Lewen, Doctor of the Civil Law, against Mody; who made Conusans as Bailiff to one Fowke, and shewed, That 14 Elizabeth, the morrow of the Purification, a Fine was levied between Lovelace and Rutland Plaintiffs, and the said Fowke and other Desorzeants: by which Fine, the said Desorzeants acknowledged the said Mannor to be the right of the said Lovelace and Rutland, come ceo, &c. And the said Lovelace and Rutland, by the same Fine, granted and rendred to the said Fowke a Rent of 20l. per annum in Fee out of the said Mannor; And for the Rent arrear, &c. And the Plaintiff in bar of the Conusans, shewed, That the said Fowke being seised of the said Rent, granted the same to one Horden, &c. Upon which Grant they were at Issue: And the Jury found, That the said Fowke being seised of the said Rent, by Indenture reciting, That whereas a Fine was levied between Fowke and 7 others Plaintiffs, and Lovelace and Rutland Desorzeants; as the rest ut supra, granted red-ditum prædict. to Horden; and further found, that no other Fine was

was levied between the parties aforesaid but the said Fine, and that the parties to the Fine were seised of the Mannor at the time of the Fine levied, and of no other Land: And if this Rent so described by the said Indenture, should pass or not, was the Question? And it is to be observed, That the Indenture of Grant between Fowke and Horden, recited a Fine of the Mannor of Coleshall inter alia, where the Jury have found, That the Fine was levied of the said Mannor only. And it was argued by Shuttleworth, That the said Rent did not pass to Horden by the said Indenture; for the Rent, described by the Indenture, is not the Rent which was granted by the Fine: And if I let Lands for years to A. and afterwards A. grants the Land which B. holds of me, the Grant is void; As 13 E.3. Grants, 63. Land is given to Husband and Wife for their lives; And the Lessor grants the Reversion of the Land which the Husband holdeth for life, nothing passeth. Walmesley, contrary; The variance in the Fine shall not avoid the Grant; For the Indenture of the Rent agrees with the Fine, in the Term, in the year of the Reign, and in the name of the parties to the Fine, in the quantity of the Rent, and in the Land charged; the only difference is in the phrase of Law, Deforçant for Plaintiff; and it is granted, that that is but a matter of Circumstance, and not of Substance. Snag, Serjeant, contrary. And first he took Exception to the Verdict; for this, that a special Verdict is given upon a special Absq; hoc. And the Lord Anderson interrupted him, That it was a clear Case, That such a Verdict upon such an Issue might be found. And so it was adjudged in the Case between Vavasour and Doleman. Fenner argued, as Walmesley, The Grant agrees with the Fine in the points of greatest importance, and one fault shall not prejudice it where there are so many verities which may induce the Court to judge, That the Rent granted by the Indenture, is the Rent created by the Fine: and in a Fine, the substance is not, Who was Deforçant, who was Plaintiff; but who was party to the Fine? And that some of the parties to the Fine were seised of the Land of which the Fine is levied: And if the Indenture had been, Whereas such a Rent was granted by a Fine levied between A. and B. without shewing who was Plaintiff, and who Deforçant, it had been good enough. And although that in this Case, the Plaintiff and Deforçant are mis-set down, yet the same shall not make the Grant void; for utile per inutile non vitiatur. So if I reciting, The Original Grant was made to me by Indenture Tripartite between A. of the first part; B. of the second part; and myself of the third part; whereas the Indenture it self is, Between myself of the first part, the same is not material, &c. For, such a small mistaking shall not avoid the Grant. So if I by my Deed reciting, That whereas I am possessed of certain Lands for Term of years of the Demise of Sir Christopher Hatton, Knight, Treasurer of England; whereas in truth he is Chancellor; that mistaking of the Dignity shall not prejudice the Grant. And it was Agreed

Agreed by all the Justices, If the said Fine had been pleaded at it is recited in the Indenture, mistaking the Plaintiff and Deforciant; he who had so pleaded it, had failed of his Record; But in the Case at Bar, the reciting who was Plaintiff, who Defendant, was matter of surplusage, and therefore it shall not hurt the party. As 23 Eliz. Dyer, 376. A. seised of a House in D. which he purchased of Tho. Cotton, he made a Feoffment thereof by these words; A House in D. late Richard Cotton's. And notwithstanding this variance, it was good enough; for the variance is in a thing which is matter of surplusage: and so much the rather, because the said A. had not another House in D. &c.

Passch. 28 Eliz. In the Common Pleas.

CLXXXVI. Lucas and Picrofi's Case.

The Case was, That an Assise of Novel Disseisin was brought in the County of Northampton, of two Acres of Lands; and as to one Acre, the Tenant pleaded a plea tryable in a Foreign County. Upon which the Assise was adjourned into the Common Pleas, and from thence into the foreign County; Where, by Nisi prius, It was found for the Plaintiff; and now in the Common Pleas, Snag, Serjeant, prayed Judgment for the Plaintiff; and cited the Book, 16 H. 7. 12. Where an Assise is adjourned into the Common Pleas for difficulty of the Verdict, they there may give Judgment. But all the Court held the contrary; For here is another Acre of which the Title is yet to be tryed before the Justices of Assise; before the tryal of which, no Judgment shall be given for the Acre of which the Title is found. And the Assise is properly depending before the Justices of Assise, before whom the Plaintiff may discontinue his Assise. And it is not like to the Cases of 6 E. 4. and 8 Aff. 13. Where in an Assise, a Release was pleaded, dated in a foreign County; which was denyed: Wherefore the Assise was adjourned into the Common Pleas, and there found by Enquest, not the Deed of the Plaintiff's. Now if the Plaintiff will release his Damages, he shall have Judgment of the Freehold presently. But in our Case, parcel of the Land put in View, remains not tryed; which the Plaintiff cannot release, as he may his Damages, and therefore the Court remanded the Verdict, to the Justices of Assise.

² Len. 47.

² Len. 159.

Mich. 28 Eliz. In the Common Pleas.

CLXXXVII. *Hare and Mellers Case.*

Post. 163.

Hugh Hare of the Inner-Temple brought an Action upon the Case against Phillip Mellers, and declared, That the Defendant had exhibited unto the Queen a slanderous Bill against the Plaintiff, charging the said Hugh to have recovered against the Defendant 400*l.* by Forgery, Perjury, and Cosening; And also, that he had published the matter of the said Bill at Westminster. &c. In this Case, it was said by the Court, That the exhibiting of the Bill to the Queen, is not in it self any Cause of Action; For the Queen is the Head and Fountain of Justice, and therefore it is lawful for all her Subjects to resort unto her ad faciendam Querimoniam: But if a Subject after the Bill once exhibited will divulge the matter therein comprehended to the disgrace and discredit of the person intended, the same is good cause of Action. And that was the Case of Sir John Conway, who upon such matter recovered: And as to the words themselves, It was the Opinion of the Court, That they are not actionable: For it is not expressly shewed, That the Plaintiff hath used perjury, forgery, &c. And it may be, that the Attorney, or Solicitor in the Cause, hath used such indirect means not known to the Plaintiff: And in such case it is true, That the Plaintiff hath recovered by forgery, &c. and yet without reproach: And by perjury he cannot recover, for he cannot be sworn in his own Cause. It was adjudged against the Plaintiff.

Mich. 28 Eliz. In the Common Pleas.

CLXXXVIII. *Moore and the Bishop of Norwich's Case.*

In a Quare Impedit by Moor against the Bishop of Norwich, &c. It was found for the Plaintiff; and thereupon issued forth a Writ to the Bishop, which was not returned; Upon which an Alias issued forth: Upon which the Bishop returned, That after Judgment given in the Quare Impedit, the same Incumbent against whom the Action was brought, was Presented, Instituted, and Inducted into the same Church, and so the Church is full, &c. And if that was a good return, It was oftentimes debated. Windham cited the Case, L. 5 E. 4. 115, 116. A Quare Impedit against Parson, Patron, and Ordinary, and, pendant the Writ, the Parson resigned, and the Ordinary gave notice of it to the Patron; and afterwards by Lapse, the Ordinary presented the same Incumbent, who resigned: And afterwards, the Plaintiff in the Quare Impedit had Judgment to recover. And it was holden, Because the same Incumbent is now in by a new title; scil. by Lapse, and the same person against whom the recovery was had; and that appeared to the Court, he should be removed. See 9 Eliz. Dyer, 260. and

and 21 Eliz. Dyer, 364. And it was said by the Lord Anderson, That person soever is presented and admitted after the Action brought, unless it be that the title of the Patron be paramount the title of the Plaintiff upon such Recovery he shall be removed: And so in the principal case, It was adjudged, That the Return of the Bishop was not good. Wherefore, he was fined 10l. and a Sicut alias awarded upon pain of 100l.

Mich. 28 Eliz. In the Kings Bench.

CLXXXIX. Parret and Doctor Matthews Cafe.

A Præmunire was brought and prosecuted by the Queens Attorney General and Parret, against Doctor Matthews Dean of Christ Church in Oxford, and others, for that they procured the said Parret to be sued in the City of Oxford before the Commissary there, in an Action of Trespas, by Libel according to the Ecclesiastical Law; In which Suit, Parret pleaded his Freehold, and so to the Jurisdiction of the Court; and yet they proceeded there, and Parret was Condemned and Imprisoned: And afterward, the said Suit depending, the Queens Attorney withdrew his Suit for the Queen. 1 Lem. 292.

It was now moved to the Court, If, notwithstanding that, the party Informer might proceed in his suit there? See 7 E. 4. 2. the King shall have Præmunire; and the party grieved, his Action, See Br. Præmunire, 13. for by Brook, None can have Præmunire but the King.

Cook, There is a President in the Book of Entries, 427. In a Præmunire, the words are, Ad respondendum tam Domino Regi quam R. F. and that upon the Statute of 16 R. 2. And see *ibid.* 429. tam Domino Regi de Contemptu prædict. quam dicto A.B. de Damnis: But it was holden by the whole Court, That if the Queens Attorney will not ulterius prosecute, the party grieved cannot maintain that Suit; For the principal matter in the Præmunire is the Conviction; and the putting of the party out of the Kings protection; and the damages are but accessory; and then the Principal being Released, the damages are gone. And it was also holden, That the Presidents in the Book of Entries, are not to be regarded; for there is not any Judgment upon any of the pleadings there.

Mich. 28 Eliz. In the Kings Bench.

CXC. Archeboll and Borrell's Cafe.

A Archeboll brought an Action upon the Cafe against Borrell, and declared, That the Defendant had procured one L. to bring an Appeal of the death of J.S. against the now Plaintiff. To which

which Enditement the now Plaintiff pleaded, Not guilty; and upon that he was acquitted. The Defendant pleaded, That the now Plaintiff was indicted of the said death in the County of S. scil. of the stroke, and of the death of the dead in the same County. To which the Plaintiff by Replication said, That the said J.S. was struck in the said County of S. but died in the County of D. so as this Inditement found in the County of S. is void by the Common Law: and by the Statute of 2 E. 6. the party ought to be Indicted in the County where the party died, and not where the stroke was given. And upon that Replication, the Defendant demurred in Law.

Broughton, The Plaintiff ought to be barred; 1. The Plaintiff was not lawfully acquitted, for the proceedings are not by due process; For upon the Writ of Appeal, no Pledges are returned. Which see, 11 H. 4. 160. Then, if the Appeal was not duly sued, the Plaintiff was not duly acquitted; and then Conspiracy, or Action upon the Case doth not lie: For such suit doth not lie, but where, if the Plaintiff had been found guilty, he should have Judgment of life and member: Which shall not be, upon an insufficient Appeal, 9 H. 5. 2. 2. Because it is not shewed in the Declaration, If the Defendant did slie, or not. 3. The Declaration wants these words, Falso & Malitiose, as they are in the Writ of Conspiracy. And also it is not shewed, If the Plaintiff in the Appeal be sufficient or not; For if he be sufficient, the Abettors shall not be enquired. See Westm. 2. And as to the Action it self, he conceived, That it doth not lie by Bill, but by Original Writ against those who are found Abettors. See 2 E. 2. Fitz. Action upon the Statute, 28. Such suit by Writ. But see 25 Eliz. It was holden, Such suit doth not lie by Writ. And see Book of Entries, 43, 44.

Flemming, to the contrary, It needs not to be shewed, That the Plaintiff found Pledges ad prosequendum, For without that, the Writ is good enough; and although that the Writ be not well executed, yet it is good. For our Action is not grounded upon the Record of Appeal, but at the Common Law, and the Record is but Conveyance to our Action: And also there needs not in the Declaration, falso & malitiose, for they are implied in the words, Abettavit, & procuravit. And he conceived, That this Action is at the Common Law, and not only upon the Statute of Westm. 2. Which see, Stamford, 172. And see 3 E. 3. Fitz. Conspiracy, 13. Conspiracy lieth upon an Enditement of Trespass, as well as upon an Enditement of Felony; for the Law hath provided remedy in every Case where a Man is dammified. As 43 E. 3. 20. A Writ of Disceit was brought, for that the Defendant by fraud and Collusion had procured J.S. to bring a Formedon against the Plaintiff of such a Manor, by reason whereof the Plaintiff was put to great charges, and holden maintainable: And the Statute of West. 2. is in the affirmative, and therefore it doth not abidge the

the Common Law, but the subject may take the advantage of the Common Law if he pleaseth; For it may be that the Course according to the Common Law will more avail him, than that upon the Statute: For upon the Statute Law, If the Abettors have not any thing, the party is without remedy; but by the Common Law, the party grieved, shall have execution upon the body. 13 E. 2. Conspiracy holden maintainable against one who procured one to sue an Appeal against the Plaintiff. See Fitz. Conspiracy, 25. Fitz. Na. Br. 98. If A. procures B. to sue an Action against me, to vex and molest me, an Action of Disceit lieth. And as to the matter of the Endowment, I conceive, that it is not any bar; For the Endowment is merely void, because it was found in the County where the stroke was, and not in the County where the party stricken died, where of right it ought to be; and that by the Statute of 2 E. 6. Then if the Endowment be insufficient, it is as no Endowment, and then the Plea cannot excuse the Defendant. Which see, 20 E. 4. 6. If the Endowment be not sufficient, the Appellee shall wage Battail, and the Abettors shall be acquitted. Vide inde, 19 E. 3. Coron. 444. 26 H. 8. 2. And by the Common Law, the Plaintiff might at his pleasure bring an Appeal where the Plaintiff was stricken, or where he died; but in such case, the tryal shall be by both Counties. And 3 H. 7. 12. Appeal was brought in the County where the party was stricken; And 44 H. 7. 18. the Appeal was brought in the County where the party died; and there it is said, That in an Appeal the Plaintiff may declare, as if the thing were done in both Counties, but the Endowment ought to be in one County only. And 43 E. 3. 18. A Man stricken in one County, and dieth in another County, the Appeal shall be brought in the County where he died. In an Action upon the Case brought in the County of Essex, the Plaintiff Declared, That the Defendant held certain Lands, by reason of which he ought to repair a Wall in the County of Essex juxta le Thames, and that the Plaintiff had Land in the County of Middlesex adjoining to the said Wall; and for want of repairing the said Wall, his Land in the County of Middlesex was drowned; and the Writ was allowed, being brought in the County of Essex. See 6 H. 7. 10.

Clench, I conceive this Action doth not lie by the Common Law; For no Writ of Conspiracy was at the Common Law before the Statute. And vide F. N. B. 114. F. If the Plaintiff in an Appeal be Nonsuit, Conspiracy lieth; but contrary, if he be acquitted, for he shall have his remedy against the Abettors, &c.

Plowden, This Action lieth at the Common Law, and an Endowment is no Plea in this Action; and it is not grounded upon the Statute as a Conspiracy is, and so it well lieth, although the Abettors be not Enquired.

Gawdy, Serjeant, This is an Action by the Common Law; For in all cases where one procures damages to another, so as the party

party is put to charges, an Action lieth, a fortiori where the procurement extends to the danger of life. And see F. N. B. 116. F. Men conspire to have a false Office found of my Lands, which Office is found by such procurement, Conspiracy lieth: And the Statute of 2 E. 6. doth not alter the Law before; for it is in the affirmative. See the Statute, Cap. 24.

Gawdy, Justice, Conceiveth, That the Endicement did not excuse the Defendants in this Action, but against those who are sworn to give Evidence for the King, and not others; For they may well procure an Appeal maliciously, notwithstanding the Endicement.

Walmesley, Serjeant, conceived, That the Action doth not lie at the Common Law; For in no case where the party useth but the means of the Law by the Kings Writ, without any Corruption or Cobin of the party, he shall be amerced only pro falso clamore, and no Action lieth against him, because he hath not used but the means of the Law. Which see, 2 R. 3. 9. by all the Justices. But yet in an Appeal, because it toucheth the life of a Man, the Defendant shall have his damages against the Plaintiff, but not in any other Action which is a vexation by suit, if no Corruption or Cobin be in the party who prosecutes such suit. See such matter justifiable in Conspiracy, 35 H. 6. 13, 14. Afterwards, the principal Case was adjourned.

Pasch. 28 Eliz. In the Kings Bench.

CXCI. *Parker and Howard's Case.*

2 Len. 102.

IN Debt upon an Obligation, the Condition was, That whereas the Plaintiff and Defendant be now jointly seised of the Office of the Register of the Court of Admiralty, If the Defendant shall permit the Plaintiff to exercise the said Office, and take the profits of it wholly to his own use during his life, without let or interruption done by him, That then, &c. The Defendant pleaded, That the Custom of the Realm of England is, That the Lord Admiral for the time being, might grant the said Office, and that such Grant should be good but for the life of the Grantor. And further shewed, That the Lord Clynton, Lord Admiral, granted the said Office to the Plaintiff and the Defendant, and died; And that the Lord Howard was appointed Lord Admiral: And that he 27 Eliz. granted the said Office to one Wade, who put him out, and interrupted him; before which time the Defendant suffered the Plaintiff to enjoy the said Office, and to take the profits of it: Upon which the Plaintiff demurred in Law.

1 Len. 103.

Cook argued for the Plaintiff, That the Defendant's Plea was not good, for he hath not entituled the Lord Admiral to grant the Office; For he saith, That the Custom of the Realm of England is; which he hath pleaded in such manner, as no Issue can

can be taken upon it; for it is pleaded, *Quod usitatum est quod Admiralis pro tempore existens, Non potest Concedere Officium prædict. nisi pro termino vitæ suæ*; and that cannot be, for it cannot be tryed; for the *Venire facias* cannot be, Of the Realm of England: Also, if it be, Through the whole Realm of England, then the same is the Common Law, and not Consuetudo. Which see, Br. Custom, 39. And see 4 & 5 Mar. Dyer, 152, 153. An express case of this Office; And there he prescribes in Consuetudine in Anglia, &c. And also, that such Grant is good but during the life of the Admiral who granted it. Also he doth not answer to any time of the Grant of the Admiral Howard; For if he were lawfully put out by Wade, yet the Defendant against his own Obligation cannot put us out, or interrupt us. As L. 5 E. 4. 115. In a *Quare Impedit* against an Abbot and the Incumbent, who make default upon the distress; upon which a Writ to the Bishop was awarded for the Plaintiff: Upon which the Bishop returned, That the Incumbent resigned; of which the Bishop gave notice: And afterwards Lapse incurred, and the Bishop collated the said former Incumbent, and then that Writ came to him. Now although the Incumbent be in by a new title, yet he is bound by the Judgment. So here, although the Defendant had another title, and the former title of the Plaintiff be determined; yet against his own Deed and Obligation, he shall not put out the Plaintiff. And the Court was clear, That the Judgment should be given for the Plaintiff. But afterwards, the Cause was Compounded by the Order of the Lord Chancellor.

Mich. 28 Eliz. In the Kings Bench.

CXCII. *Mannings Case.*

NOte: It was agreed by the Justices in this Case, That where an Infant Executor sold the Goods of his Testator at less under value than they were worth; And afterwards brought an Action of Detinue against the Vendee upon it in retardatione executionis Testamenti; That this sale of the Infant Executor was good; and should bind him notwithstanding his Non-age.

CXCIII. *Mich. 28 Eliz. In the Common Pleas.*

THe Case was; A Man made a Feoffment in Fee to the use of himself for life, and afterwards to the use of his eldest Son in tail, and afterwards to the use of his right Heirs, not having at the time of the Feoffment any Son: Afterwards, he suffered a Common Recovery, had Issue a Son, who died in the life of his Father, having Issue a Son, and afterwards he himself dieth: It was holden

in this Case, That the Son and Heir of the Son, should not avoid this Recovery by the Statute of 32 H. 8. For there was not any remainder in him at the time of the Recovery had, but the remainder then was in abeyance; for then the Son was not born: And the words of the said Statute are, That such Recovery shall be void against such person to whom the Reversion or Remainder shall then appertain; i. e. at the time of the Recovery. And it was said, That if Lands be given to E. for life, the Remainder to B. in tail, the Remainder to C. in fee; B. dieth, his Wife with Child with a Son; A Recovery is had against E. with the assent of C. and afterwards the Son is born, he shall not be helped by this Statute, for that the Remainder was not in esse at the time of the Recovery. But it was holden in the principal Case, That the Heir might avoid this Recovery by the Common Law: For the Recompence could not extend to such a Remainder which was not in esse.

Hill. 28 Eliz. In the Common Pleas.

CXCIV. The Countess of *Suffex* and *Wroth's Case.*

It was moved in this Case by Gawdy, Serjeant, If the Disseisor Licence J.S. to put his Cattle into the Land whereof he was disseised; If it were a good Licence? And, If by the Execution of the said Licence, the Freehold should be reversioned in the Disseisor, so as if the Disseisor distrain the Cattel of J.S. for Damage-feasant, and in a Replevin abow, the Plaintiff may plead, That the Freehold was in the Disseisor who so Licensed him? Periam, Justice, The Licence is void; For at the time of the grant of it, the Disseisor had but a Right before he had recontinued the Land by re-entry. Windham, If the Disseisor make a Lease for years of the Land, whereof he is Disseised, it is a void Lease. Anderson, If the Disseisor command one to enter into the Land, and he doth accordingly, the same is good. The Case was adjourned.

Mich. 28 Eliz. In the Exchequer.

CXCV. *Payn's Case.*

2 Len. 205.

A Writ of Error was brought by Payn, Treasurer of the Records in the Kings Bench, in the Exchequer-Chamber, upon a Judgment given in the Court of the Exchequer for the Queen, upon an Assignment of a Lease for years by the Countess of Oxford to the Queen; One Error was assigned, because whereas the Issue was joyned upon the Intrusion, and the taking of the profits, and so two matters put in Issue; and the Jury have found Payn guilty of the Intrusion; but have said nothing of the taking of the profits, and so the Clerk doth not meet fully with the

the Issue. The great matter of the Case was upon this Point; The Information is, That the Assignment of the Queen was, 16 Maii, the Intrusion 17 Maii, the Inrollment of the Deed of Assignment 18 Maii; And so it appeared upon the Record, that the Intrusion is supposed to be done before that the Queen had any Interest in the Land in which the Intrusion is supposed, for nothing was in the Queen before the Enrollment: For the Queen is a Corporation of State, of such Privilege and Excellency, That she cannot give or take an Interest in Land without matter of Record; And this Lease is a Chattel-real, and an Interest in Land. See as to the Inrollment, 1 H. 7. 30. 31. 5 E. 4. 7. 7 E. 4. 16. But I agree, That if Lessee for years be Outlawed, the Lease shall be in the King without Office, for the Outlawry it self is a sufficient Record to entitle the King unto it. If the Queen makes a Lease for years of Lands rendering Rent, with a Clause, That if the Rent be behind, that the Lease shall cease, if the Rent be not paid. It was agreed here in Sir Moile Finch's Case, That the Lessee continuing his possession, shall not be accounted an Intruder before Office thereof found, but he shall be Accountant to the Queen for the profits as Bailiff of his own wrong: but here we are charged with Intrusion.

It hath been doubted, If personal things are in the King without Office, 37 H. 6. But now it is clear they are. As 35 E. 3. Br. Pre-rogat. 113. The Ullain of the King purchaseth goods, the property thereof is in the King without seizure; and so it is of all personal Chattels, because they are transitory, 1 H. 7. 17. 4 H. 7. 1. 39 H. 6. 26. And here it appeareth upon the Record, that this Deed of Assignment was delivered to Baron Clark, 16 May, at Westm. and that was Ascension-day, and so non dies Juridicus, and so no Court there then holden, and then the said Deed was not delivered in Court of Record, and then not delivered to him as a Judge, but as a private person, although that it was delivered to the use of the Queen. But in 37 H. 6. there is some Opinion, That if such a Deed be delivered in Court to one of the Barons, or be put into the Kings Coffers, that then it is a Record.

Atkins, to the contrary: And to the first Exception, It is to be known, That in every Plea where a Contempt is laid to the charge of the Defendant, he ought first to excuse his Contempt: And therefore here the Exordium of the Plea is, Quoad venire vi & armis, & quicquid est in Contemptu Domine Regine, necnon de tota ulteriore transgressione & Contemptu per ipsos supposit. Quod ipse in nullo est inde Culpabilis: And afterwards plead over: And so it is in an Action of Trespass. And also upon the Statute of 8 H. 6. of Forcible Entry; and here the Issue upon the Contempt doth ensue the other Issue; For if the other Issue is found against the Defendant, so also is this. As to the other point I agree, That a Corporation cannot take or speak without writing:

Et

And

And the King being a Corporation, and who only makes Corporations, cannot take but by writing of as high a nature; *scil.* by Record: And we have here a Record (as is granted by the other side) being enrolled 18 May, which was delivered 16 May; and being once enrolled, it hath relation to the time of the delivery; i. e. to 16 May; And then Payn upon the whole matter was an Intruder 17 May: and an Intruder by his Entry doth not gain any thing against the Queen; and therefore the Information of the Intrusion is, *diversis diebus & vicibus intravit*; although it be but one continued possession; and therefore every Instant during his possession, he is an Intruder. As to the delivery of the Deed of Assignment upon the day of the Ascension, which is not dies Juridicus, that is not material. As 12 E. 4. 8. by Pigot, If the day of Return of a Writ, i. e. 4th die, falls upon a Sunday, it is good enough, although no Court can then be holden but the day following, and the Plea is not discontinued; And this delivery of the Deed of Assignment might be made out of Term there upon any day in the Term which is not dies Juridicus. Contrary, where the thing is of necessity to be done in the Term; as in the Case between Fish and Bocker, of Proclamations made upon a Fine; for a Man may acknowledge a Recognizance or a Deed to be enrolled in the time of Vacation, &c.

Tanfield, As to the Interest, the Enrolment hath relation, not as to the profits; for Payn cannot be Intruder 17 May, by any Relation.

Popham, The Queens Attorney, When an Information of Intrusion and taking of the profits is here exhibited, the Defendant ought to justify his Entry; and if the Entry be found against him, so as his Entry is an Intrusion, then the illegal taking of the profits is found also. And he said, That the Deed acknowledged and delivered to the Baron, is a Record, although not enrolled, be the acknowledgment thereof in Court, or out of Court. If an Information upon a penal Law be exhibited to a Baron of the Exchequer out of Court, and afterwards another Informer exhibits another Information upon the same Statute for the same Offence against the same person, and that is exhibited in the Court before the first; The first Information shall be preferred, and the Defendant shall answer to that, and not to the other: and for exhibiting the same in Court, or out of Court, it is not material. And the Assignment when it is enrolled, hath relation unto the acknowledging of it. A Reversion is granted to one for life, the Remainder to the King; the particular Tenant attorns to the King, the Remainder is not in the King by the Attornment; but if the Deed be afterwards enrolled, it shall be said to be in the King from the time of the Attornment: And the King shall have the benefit of all the mean profits from the time of the Attornment. A Lease for years is made by the King, reserving Rent, with a clause, That if the Rent be not paid, that the Lease shall be

be void: the Rent is not paid 10 years, after an Office is found, the King shall be answered all the profits from the time of default in payment of the Rent. And although no Intrusion can be laid in the Information 17 May, yet it shall be good for the 18th day.

Cook, The Judgment for the Queen upon an Information of Intrusion, is, Quod defendens, de Intrusione, transgressionem, & Contemptu prædict. vincatur, &c. And afterwards, a Commission shall issue forth, for to enquire of the Mean profits, and there the Defendant may shew this matter in taking of the damages: And if the Intrusion be at any time in the Information, it is sufficient enough to have Judgment upon it: and in our Case, the Continuance is laid 18 May.

Egerton, Solicitor, The Record warrants the Judgment given upon it; For possession laid in the Queen, is sufficient to this Information. And here Payn doth not answer the Queens title, but traverseth the Intrusion, And therefore he being found Intruder by Verdict, Judgment ought to be given upon it. For the Jury have found the Intrusion generally, and specially, 17 May. And that cannot be assigned for Error; for it is part of the Verdict, of which Error doth not lie, but Attaint: For if any Error was, it was in the Jury, and not in the Court. Which Manwood Concessit.

Tanfield, As to the Case of Continuance of an Intrusion, it is clear, That every continuance ought to have a beginning; for a thing, which hath no beginning, cannot be continued; and here is not any beginning: for the beginning which is laid in the Information, is pretended to be 17 May; and that cannot be, *causa quæ supra*.

Popham, If an Information be brought of an Intrusion, where in truth there is not any Record to prove it, and the Jury find the Intrusion, shall you have a Writ of Error upon it? And every continuance of Intrusion, is an Intrusion. This Matter had been good Evidence to the Jury. Sed non habet locum hic, &c.

Hill. 28 Eliz. In the Exchequer.

CXCVI. Sir John Southwell's Case.

Sir John Southwell of the County of Lanc. 7 July, 19 Eliz. 2 *Len. 132.* made a Conveyance of all his Land to divers Feoffees and their Heirs, upon Condition, That they should find him and his Wife, and so many persons in his House, &c. prefer his Daughters in Marriage, pay his Debts, &c. And if there fell out at the years end upon Account made by the Feoffees any surplussage, that then at the end of every such year they should answer such surplussage as should then remain in their hands unpended of the Rents and Profits of his said Lands, with Clause of Revocation, &c. After-

wards, the said Conveyance being in force, came the Statute of 23 Eliz. concerning Reculants: Upon which Statute, the said Southwel was now Indicted: And afterwards, a Commission issued out of the Exchequer to the Sheriff of Lancast. to enquire of the Lands of the said Southwel; And although against the said Conveyance it was given in Evidence, That after that Conveyance, the said Sir John Southwel had granted Trees out of the said Lands, and had taken Fines and Incomes for Leases, &c. Yet the Jurors, charged to enquire, would not find, That the said Sir John had any Lands, &c. And by special Commandment of the Queen, it was referred out of the Exchequer, to all the Justices of England, If the Lands of the said Sir John Southwel contained ut supra, were subject to the said Statute, and the penalties thereof? And upon great deliberation had, It was by them all Resolved and Agreed, That notwithstanding that Conveyance, the said Lands were lyable to the said Statute. And as to the Jurors which against their Evidence given unto them for the Queen, gave their Verdict, ut supra; process was awarded against them out of the said Court, for to appear before the Lord Treasurer, and the Barons of the Exchequer: And for their said Contempt, they were committed to the Fleet, and each of them fined 50 l.

CXC VII. Hill. 28 Eliz. In the Common Pleas.

IN a Writ of Entry *Sur Disseisin*, The Tenant said, That the house in demand is within the City of London; and that the said City is antiqua Civitas; And that King Hen. 3. Concessit civibus Civitatis prædictæ quod non implacerentur de Terris & Tenementis suis, &c. extra muros Civitatis prædictæ. And further said, That he himself is Civis London, &c. and demanded Judgment of the Writ: (Note, in the pleading before, the Tenant said) & illis rectum teneatur intra Civitatem prædictam secundum Consuetudinem Civitatis prædictæ. And to this Plea, Exception was taken, because that the Tenant doth not shew before whom by their Custom they ought to be impleaded. It was the Opinion of the whole Court, That the Tenant ought to have shewed, That the Citizens for their Lands ought to be impleaded in the Hustings, &c. And the general words in the plea; scil. Sed illis rectum teneatur intra Civitatem prædictam secundum Consuetudinem Civitatis prædictæ. did not supply the defect aforesaid. After, It was awarded by the Court, That the Tenant answer further, &c.

Mich. 29 Eliz. In the Common Pleas.

CXCVIII. The Lord *Anderson's* Cafe.

The Lord *Anderson*, Chief Justice of the Common Pleas, brought an Action of Trespass by Bill, for breaking of his House in the City of Wor. against one A. Citizen of the said City: Now came the Mayor and Communalty of the said City, and shewed their Charter granted to them by King E. 6. and demanded Conusans of Pleas. And by the Award of the whole Court, the Conusans shall not be granted, because that the Priviledge of this Court whereof the Plaintiff is a principal Member, is more ancient than the Patent, upon which the Conusans is demanded. For the Justices, Clerks and Attornies of this Court, ought to be here attending to do their Offices and Services, as belongs unto them, and shall not be impleaded, or compelled to implead others elsewhere than in this Court. And this Priviledge was given to this Court upon the Original Erection of it. And such was the Opinion of the whole Court. And as for the Conusans, it was denied.

1 Roll. 189.

Mich. 29 Eliz. In the Common Pleas.

CXCIX. *Cocket and Robston's* Cafe.

Arthur Cocket, Thomas Andrews, and A. his Wife, brought an Action of Accompt against Robston, and Declared, That one Mountford by the hands of Jo. Wase, had delivered 100 l. to the Defendant pro relevamine of the said Arthur and Anne. The Defendant pleaded, Ne unq; Receiver pur accompt render: Upon which they were at Issue. And Judgment was given, That the Defendant should accompt: Altho, before Auditors assigned, alledged, That he had expended the said 100 l. in the Education of the said Arthur and Anne, by the space of 8 years after the delivery of the said 100 l. Upon which they were at Issue. And upon Evidence it was shewed on the Plaintiffs part, That heretofore the said Arthur brought a Writ of Accompt against the said Robston, as Guardian in Socage for the Land of the said Arthur descended; And upon the said Accompt, the said Robston demanded allowance of 20 Marks by the year for the said 8 years, for the Education of the said Arthur, which was allowed to him; so as now he shall not be received to demand allowance for the said 8 years for the Education of the said Arthur out of the Accompt of the said 100 l. and that was fully proved to the Jury. It was moved, How the Jury should demean themselves in their Verdict? For the Issue is, That the Defendant had expended the whole 100 l. in the Education of the said Arthur and Anne. And some were

2 Len. 118.

Post. 192.

230.

1 Len. 219.

1 Len. 302.

were of Opinion, If the Defendant had expended part in the Education of the said Anne only, yet the Jury ought to find for the Plaintiffs: For the Issue is entire upon the expending of the said 100 l. in the Education of the said Arthur and Anne, without saying how much for the said Arthur, and how much for the said Anne. But Periam and Anderson, Justices, were clear to the contrary: Wherefore they advised the Jury to find specially, if they conceived, that the Defendant had expended any part of the 100 l. and to find it, and how much. And after the Jury found against the Defendant, That nothing was expended, &c. And gave damages 20 l. And the Justices at the first doubted, If damages should be given in an Account? But at length they received the Verdict, by the manner, de bene esse. See 2 R. 2. Fitz. Account. 45. 2 H. 7. 13. 10 H. 6. 18. 21 H. 6. 26. And the Book of Entries, 17. in such case damages were given.

Hill. 29 Eliz. In the Common Pleas.

C C. Tooley and Preston's Case.

1 Len. 397.
1 Cro. 206.
2 Len. 105.

IN an Action upon the Case by Tooley against Preston, (which see, Mich. 29 Eliz. Reported in *Leon. 1. Part, fol. 297.*) Judgment was given for the Plaintiff; And now upon the Return of the Writ of Enquiry of Damages, It was moved, That for as much as the Damages are excessive, viz. 200 l. that the Court de Gratia would abridge the Damages: But the whole Court was against it; For that they as Judges cannot know what prejudice and damage the Plaintiff hath sustained, by the wrongful detaining of the said Recognizance, but the Jury may well have notice of such matter: And as the Case is here, the damages are but incertain upon the Assumpsit: For the Defendant assumed, That if he did not redeliver the said Recognizance to the Plaintiff to pay him 1000 l. so as the damages are reduced to certainty by the promise of the Defendant himself. And by Anderson, If I bail to you an Obligation, to rebail the same to me before such a day one 10 l. now upon not delivery at such a day, I shall have an Action of Debt for the 10 l. contrary, by Windham. And by Anderson, in the principal Case, If the Defendant had pleaded Non Assumpsit, and the Jury had found the promise, they might have given 1000 l. damages, without danger of an Attaint, notwithstanding that the Plaintiff could not prove that he was dammified one penny, and that by reason of the express Assumpsit of the Defendant.

Hill.

Hill. 29 Eliz. In the Common Pleas.

CCI. *Bingham and Squire's Case.*

Bingham brought Debt upon an Obligation against Squire; ^{4 Len. 611} The Condition was, That if the said Squire procure a Grant of the next Avoidance of the Arch-Deaconry of Stafford, to be made to the said Bingham, so that the said Bingham at such next Avoidance may present, That then, &c. And the Case was, That afterwards by the means and endeavour of Squire, the Grant of the said next Avoidance was made to Bingham. But before the next Avoidance, the present Arch-Deacon was created a Bishop, so as the presentment to that Avoidance appertained to the Queen: It was adjudged in this Case, That the Condition was not performed, and that by reason of these words, (So that *Bingham* may Present;) And afterwards the Plaintiff had Judgment to recover.

Hill. 29 Eliz. In the Common Pleas.

CCII. *Rolt's Case.*

The Case was; A Lease is made to two, *durante vita ipsorum & alterius eorum diutius vivent. absq; impetitione Vasti, durante vita ipsorum*; The one of them dieth: Now although some conceived there was a difference between the Limitation of the Estate, and of the Liberty, &c. for the Limitation of the estate seems to be more liberal; Yet it was agreed by the whole Court, That the Liberty runneth with the Estate, and shall endure as long.

Hill. 29 Eliz. In the Common Pleas.

CCIII. *Farmer and Dorington's Case.*

An Action upon the Case for these words, I will prove *Farmer* to be a perjured Knave. It was moved, The words are not Actionable; for it is not a meer affirmation. But after many motions; It was holden by the whole Court, That upon those words, an Action did well lie.

Mich. 29 & 30 Eliz. In the Kings Bench.

CCIV. Allen and Hill's Case.

1 Cro. 238.

In an Ejectione Firme by Allen against Hill of a House in Cornhill in London; Upon Not guilty pleaded, The Jury found this special matter; viz. That one Francis Beneson was seised of the said House in Fee; and 4 Eliz. devised the same to Anne his Wife for life, in full satisfaction of all her Chirds in London; and after her death, to Tho. Beneson his Brother in Fee: Proviso, That if Anne clearly (the words of the Verdict are totaliter) depart out of London, and dwell in the Country, that then she shall have a Rent out of the said House. And the Jury found further, That Francis died without Issue; and that afterwards Thomas died, Robert being his next Heir; And that 14 Eliz. Anne clearly departed out of London, and went to Melton in the County of Suffolk: And that afterwards Robert before any Entry, released unto Anne; and afterwards against his Release entred. It was argued for the Defendant, That by this Proviso, and the departure of Anne out of London, the Freehold was not out of her, and vested in Robert, before the entry of Robert; For if it were out of Anne, then is she but Tenant at sufferance, to whom a Release made cannot enure; And the words of the Will are not, That her Estate shall cease. And here as the case is, Anne cannot be Tenant at sufferance to him in the Remainder, betwixt whom and her there is not any privity. See 18 E. 4. 25, 26. Tenant for the term of the life of another, the Remainder over in Fee, Cestuy que vie dieth; The Tenant remained Tenant until he in the Remainder entred upon him. And so in our Case, although Anne hath clearly departed out of London, &c. yet the Freehold of the House doth continue in her, until the Entry of Robert, and then the Release made to her is good. Also the Breach of the Condition is not fully found; For the Proviso is, If she clearly departs out of London, (but it doth not stay there) and dwell in the Country, &c. And here it is found, That she clearly departed out of London; but they have not found, that she dwell in the Country, &c. but only that she went to Melton; but she ought to do both before her Estate shall cease. It was argued by Towse for the Plaintiff, That the Defendant ought to be found guilty of the Ejectment; For it is found, That the Defendant entred before the Commandment of Anne; but they have not found, that Anne was alive.

Fenner, Justice, the same is well enough: and so it was holden, 18 Eliz. in this Court; for although her life be not found, yet it shall be intended, that she was alive: For the Jury did not doubt of it; and the Conclusion of the Verdict is, That if it shall seem to the Court that his Entry is lawful, Then the Defendant is not guilty. So as the doubt of the Jury is only upon that point. Which Wray concessit.

Gawdy,

Gawdy, Justice, If one Deviseeth Land to one for life, upon Condition, That his Estate shall cease (which is all one with the Case at Bar,) and after the breach of the Condition he continueth in possession, he is not Tenant for life, but Tenant at sufferance.

Wray, Chief Justice; Tenant for the life of another continues in possession after the death of Cestuy que vie, he hath not any Freehold remaining in him; for if he dieth, nothing descends. And so it was lately adjudged by all the Justices of England, upon a Conference had between them: And the Book of 18 E. 4. is not Law. Which Gawdy, Justice, concessit. See 35 H.8. 57. acc. And he said, That the same shall be a sa Limitation by which the Estate shall cease without an Entry. And here in this Case, because they have not found, That Anne had dwelt in the Country, here is no breach of the Condition in the Case. And afterwards, by the Advice of the whole Court, Judgment was given for the Defendant, Quod querens nihil Capiat per Billam.

Mich. 29 & 30 Eliz. In the Kings Bench.

CCV. Cadee and Oliver's Case.

IN an Ejectione Firmæ by Cadee against Oliver, of a House in Holborn, &c. The Case was, The Lord Mountjoy, and the Lady Katherine his Wife, seised of the said House, and of other Lands in Fee in the right of the Wife; 6 Eliz. acknowledged a Statute-Staple of 1200 l. to Sir Lyonel Ducket: Afterwards, 9 Eliz. the said Lord Mountjoy and his said Wife Leased the said House to Hoskins for 21 years; And afterwards by Indenture, 11 Eliz. they Leased the same to Sir Tho. Cotton for 99 years, to begin at Michaelmas last past: 12 Eliz. Sir Lyonel Ducket extended his Statute; and the Land extended was delivered to him at 53 l. 7 s. per annum; who held the same until 22 Eliz. Anno 23 Eliz. the Lord Mountjoy and his Wife levied a Fine to Perry, to the use of Perry and his Heirs: 27 Eliz. Sir Thomas Cotton not being upon the Land, granted omnia tunc bona & catalla sua, to Robert Cotton his Son: 28 Eliz. the Lady Mountjoy died. Mich. 29 Eliz. the Lease to Hoskins expired: Perry entered, and Leased the House to Oliver the Defendant for 21 years; And afterwards, Robert Cotton entered, and Leased the House, &c. to the Plaintiff. It was first moved by Brantingham, and argued by him, If this Lease for 99 years which was made to begin after the Lease made to Hoskins, should pass to Robert Cotton by the words aforesaid? But the Court eased him from arguing of that point; for it was holden, That it passed, notwithstanding the word tunc. Another matter argued by him, was, because at the time of the Grant, the Lands were in extent, and so the said Sir Thomas Cotton had but a possibility; If therefore the said Grant, made during the Extent, was good?

1 Cro. 153.
Roll. Tit.
Grant. 48.

1 Cro. 356.

good? And he argued, That it was; for it is more than a bare possibility, for it is an Interest vested: And in some Cases, a possibility may be granted. As 19 H. 6. 2. The King granted to a Prior, That when any Tenth is granted to the King by the Clergy, his House shall be discharged of it, &c. And 19 E. 2. Avowry, 224. The Lord grants to his Tenant, That if he dieth, his Heir within age, that such Heir shall not be in Ward. So 21 E. 4. 44. A Grant unto an Abbot to be discharged of the Collectorship of Tenths when it shall be granted by the Clergy. It hath been Objected, That the Term for 99 years is suspended, therefore it cannot be granted during the suspension. But the same is not so; for, a thing suspended may be granted: As 15 Eliz. Dyer, 319. Husband and Wife Joint Tenants of Lands in Fee, The Queen having a Rent out of it in Fee, giveth the Rent to the Husband and his Heirs; now the Husband Deviseeth the said Rent, and dieth; the same is good a Devise, notwithstanding the suspension: And he cited the Cases, 16 E. 3. Quid juris clamat, 22. And 20 E. 3. *ibid.* 31. A Lease is made to one for life; and if he dieth within 20 years, that his Executors and Assigns shall hold the Land until the expiration of the 20 years, the said Interest may be granted. Which Wray, Chief Justice, denied. See *Gravenors Case*, 3 & 4 Ma. Dyer, 150. such Interest is void. It was further moved by him, and argued, If the Conusee of the Fine might avoid the Lease made to Sir Thomas Cotten? And he said, He could not; for he is in under the Lessors. So is 34 E. 1. Recovery in value, 36. see the Case there. And here, although the Wife after the death of her Husband may affirm, or disaffirm the Lease at her Election; yet this Election is not transferred to the Conusee by the Fine; but the Conusee shall be bound by the Fine. See 33 H. 8. Dyer, 51. As Tenant in tail makes a Lease for years not warranted by the Statute, and dieth, the Issue alieneth the Land by Fine, before affirmation or disaffirmation of the Lease by acceptance or Entry, the Conusee cannot avoid this Lease; for the Liberty is not transferred. Which Gawdy, Justice, concessit. And Election cannot be transferred over to the prejudice of another person. As if a Rent de novo be granted to the Father in Fee, who dieth before Election, the Heir cannot make it an Annuity to defeat the Dower of the Wife, quod Curia concessit. It was also moved by Brantingham, If the Lessee might enter upon the Conusee of the Statute after his Extent expired, without suing forth a Scire facias: But the Court discharged him from arguing that Point; for that by the Death of the Lady Mountjoy, the Extent was void; and therefore the Feoffee or Conusee might avoid it by Entry: And so Wray, Chief Justice, said, it had been adjudged in the Court of Common Pleas. At another day, the Case was argued by Stephens on the part of the Plaintiff; who said, That the Extent by computation of time according to the value to which it was extended, is not yet satisfied: The Verdict hath found, that the

the Extent continued until 22 Eliz. but doth not say, that it was then expired and ended. And I conceive also, that this Extent doth not vsurp the Interest of Sir Thomas Cotton, or turn it into a possibility; The extent is Quousq; leventur denarii; but yet a Limitation of time is in Law understood, although by a Casualty such time may be abridged or extended. Which see, 15 H. 7. 16. by Fairfax, Where a Man is bounden by Statute to pay 40 l. and the Conusee sueth Execution upon it, and the Land extended is rated at 10 l. per annum: now it shall be intended, by a common intent, that in 4 years the party may be satisfied; and therefore after the 4 years the Conusor shall have a Scire facias: so upon the matter it is a Lease for 4 years. So 7 H. 7. 12. by Keble to the same purpose. And 15 E. 4. 5. by Brian; for the Law shall not intend a casualty without alledging of it; for the same shall not be by imagination. And therefore, If the Conusor will have the Land within the Term, he ought to alledge, That the Conusee hath levied the duty by an extraordinary Casualty, and shew it specially. And so where the Conusor sueth a Scire facias, and the Conusee will hold the Land over, he ought expressly to surmise some extraordinary occasion wherefore he could not levy the duty upon the Land within the Term: Which see by Brian, 15 E. 4. 5. and 44 E. 3. The Conusee of a Statute after extent maketh a Lease for 3 years; yet it may be that the duty shall be levied within one year; but if it be so, then a Scire facias shall issue forth against the Conusee, and not against the Lessee; for the Law intends, that the whole estate of the Conusee is not granted, but that he hath a Reversion in him; but if he hath granted his whole estate, then a Scire facias shall issue forth against the Grantee. So here, although that this extent in our Case would continue by computation of time for some of the years of the Term granted to Sir Thomas Cotton: yet it is intended, that the extent did run out, and was determined before the expiration of Sir Thomas Cotton's Term; so as, notwithstanding that, Sir Thomas Cotton hath an Interest left in him which he may grant. It will be Objected, How can it be said an Estate for years, when as he might hold over the years? As to that, such an Interest may be put off in divers Cases; As, 15 H. 7. A Man grants to another the third Avoidance of such a Church, and dieth seised, his Wife is endowed of the Church, she shall have the third Avoidance, and the Grantee shall have the 4th Avoidance, and so per talem intervenientem occasionem, the benefit shall be delayed; and so here in our case: And then the estate by Extent being prima facie certain, so as it cannot by intendment surmount the Term of Sir Tho. Cotton, as it appereth upon the Extent; the estate shall be taken to continue according to the extent of the years, and then a certain Interest doth remain in Sir Thomas Cotton, which he may grant over, which is not a possibility, but rather a Reversion: So, and to such purpose, is the Case of 7 H. 5. 3 & 4. If the eldest Son entreat after the death of his Father, and afterwards his Mother recovereth

1 Roll. 887.

Dower, that shall take away the *possessio fratris*; but if the Son maketh a Lease for life, and the Wife recovereth Dower against the Lessee, there shall be *possessio fratris*, for the Reversion doth remain in the Lessor, notwithstanding the eviction of the estate for life. And 7 H. 6. 2. there it is holden by Goddard and Strange, That where the Term of the Wife was extended upon the Statute of the Husband, who died, the Wife shall have the residue of the Term, and avoid the extent as to her Term, which proves that all the Term is not drawn to the Conusee by the Extent, but that an Interest doth remain in the Lessee notwithstanding that. And see by Seton, 29 Aff. 64. If Lessee for life Lease to him in the Reversion for life, yet he hath a Reversion in him, And 31 Aff. 6. A. is bound by Statute to B. and his Land extended by force of it: C. recovers against B. in Debt, and the Land extended by him upon the Statute, is now extended by Elegit; A. grants his Estate to the Conusee, it is no surrender; which proves, that B. hath an Interest. And so in our Case, an Interest doth remain in Sir Thomas Cotton, notwithstanding the Extent. A. makes a Lease for years to begin at a day to come, and before the day, A. is disseised; The Lessee notwithstanding this Disseisin, may grant his Interest, for he never was in possession, and therefore it cannot be turned into a Right.

As to the second point, If Robert Cotton may enter within the time of the Extent, without a *Scire facias*: and that rests upon this point; If this Lease shall be subject to the Extent? I conceive clearly, that it shall not. It hath been said, That our Lease is not good: But I conceive it without question, that our Lease is good enough; For it is made by the Husband and Wife: and the Wife after the death of her Husband by Acceptance of the Rent, might affirm the Lease: But the Statute is the act of the Husband alone; therefore the Conusee of the Fine shall not avoid the Lease, for it is but voidable. So the King grants Lands durante beneplacito, and afterwards grants the Reversion over, the Patentee shall not avoid the Estate; But if this Lease had been made by the Husband only, it had been void, and then the Conusee of the Fine should avoid it; as it was lately adjudged in Harvy and Thomas's Case. And I conceive, That if Tenant in tail acknowledgeth a Statute, and afterwards makes a Lease according to the Statute of 32 H. 8. and dieth, the Lessee shall not hold the Land subject to the Statute, for then the Rent should not be paid to the Issue in tail during the Statute, which is against the Stat. of 32 H. 8. And see also, 8 Eliz. Dyer, 252. The Chaplain of a Donative Chappel Leased for 99 years, which was confirmed by the Patron, who was Tenant in tail of the Patronage which was appendant to a Manor, whereof he was seised in tail; and afterwards he had Issue, and died; The Statute of Chauntries cometh; after the death of the Incumbent, the King shall avoid this Lease. And in our Case, after the Coverture, the Conusee is in
by

by the Wife, and then he shall avoid the Statute extended upon it : And if so, then there needeth not any Scire facias ; as the Issue in fact may enter upon the Conusee of a Statute acknowledged by his Father ; For if Execution had been sued against the Issue in fact, it had been a Disseisin. And see 2 R. 3. 7. That in such case, the Wife, or her Heirs, may enter upon the Conusee ; And by Consequence, the Conusee who is in by her, &c.

Cook, contrary ; I conceive, that this Grant of this Lease by Sir Thomas Cotton to his Son, is not good ; for it is but a possibility, and no Interest : I agree all the Cases which have been put before, for Law, but they cannot be applied to this Case ; The Book in 7 H. 6. 2. is, That if the Term of the Wife be extended upon the Statute of the Husband, that the Wife shall have the residue after the death of the Husband ; but it doth not say, that the Wife or her Husband may grant it during the Extent ; which is the matter now in Question. And I conceive, That Sir Thomas Cotton hath but a possibility ; For the Conusee upon the Extent hath but an uncertain Interest : And although it may be by some means reduced to a certainty in the Chancery, where the Costs and Damages shall be assessed ; yet until it be reduced to a certainty, it cannot be granted. And therefore it is clear, That if I have a Term for 8 years in Land, and grant it unto another until he hath levied 100 l. and all his Costs of suit for it, by this Grant all the Interest of the Term is in the Grantee, and nothing is in me, but a possibility. And so it was holden in the Common Pleas by the Lord Anderson, the day when he was made Chief Justice there, At which time, this Case was put ; Lands of the yearly value of 20 l. are Leased to one until he hath levied 100 l. And the matter was, What estate the Grantee hath ? And it was holden, That if Liberty be not made, that he hath but an estate at Will, for the profits of the Lands are uncertain, the one year more, and the other year less : And Bromley, Lord Chancellor was then of the same Opinion. Then, if in case of a Lease it be so, it shall also be so in case of an Extent ; and in both the Cases, the whole Interest is out of the parties. And 19 Eliz. the Case was in this Court, That the Lessee for years devised his Term to his Executors for the payment of his Debts and Legacies ; and after the payment of them, the residue of the years he devised to his Son : The Executors enter, which is an assent to the remainder ; he in the remainder grants his Interest : And it was holden void, because it was but a possibility, and so uncertain : and although it might be reduced to a Certainty afterwards, yet the same is not sufficient ; for it ought to be reduced to a certainty at the time of the grant. And 17 Eliz. in this Court the Case was, That Land was given to the Husband and Wife, and to the Heirs of the Husband ; the Husband makes a Lease for years, and dieth ; the Wife enters, and enter-marrieth with the Lessee : And it was moved, If the Interest of the Lessee by the enter-marriage, was extinct ? And it was holden, That

2 Roll. 48:
1 Cro. 15:
1 Inst. 22. b:

8 Co. Mar-
nings Case:

it was not ; for it was but a possibility, and not an Interest, quod fuit concessum per totam Curiam. And if a possibility cannot be extinct, then it cannot be granted. And he denyed the Case put by Stephens, Where a Man leised of Lands Leaseh the same for years to begin at a day to come, and afterwards before the day, the Lessee is disseised ; now during that Disseisin, the Grantee cannot enter for his future Interest ; For the Fee simple being turned into a Right, so also shall be the Interest. And that is proved by Delamere's Case, A Feoffment in Fee was made to the use of A. for life, and afterwards to the use of C. for life, and afterwards to the use of D. in Fee ; and afterwards A. enfeoffed a stranger, who had notice of the use ; The same doth take away all the other uses ; and said Feoffee although he had notice of the use, yet he shall not be seised to the first use, for the estate out of which the first uses do arise, is taken away ; and then also the uses. And he said also, That the Lease made to Sir Thomas Cotton is not good ; for it was made, 11 Eliz. And it is found by Verdict, That 10 Eliz. a Writ of Extent issued forth upon the Statute, then was the Lands in the hands of, &c. during which time, the Lord Mountjoy and his Wife could not make the Lease aforesaid to the said Sir Thomas Cotton. And as to that, see 5 E. 3. Return of the Sheriff, 99. See the Case of 3 E. 6. Dyer, 67. *Stringfellow's Case*. Then admitting the Lease to Sir Thomas Cotton, yet the Lessee cannot put out the Conusee without a Scire facias ; for the Conusee is in by matter of Record. Also here, this Lease made by the Husband and Wife without any Rent reserved, is utterly void, and then the Conusee shall take advantage of it, 9 H. 7. 24. 18 E. 4. 2. And so was it ruled in the Case of *Seniori puero*, in the case of an Infant. And see 7 Eliz. Dyer, 239. Where the Provost of Wells being Parson impersoned of the Patronage of W. Leased the Tythe for 50 years, rendering Rent, which was confirmed by the Dean and Chapter, but not by the Patron and Ordinary : And afterwards by Act of Parliament, the Provostship was united to the Deanery cum primo vacare contigerit ; The Provost died, the Dean accepteth the Rent ; The same shall not bind the Church, for the Lease is void, as it is of a Parson, or Prebend, &c. And so the Dean shall take advantage of it, although not privy to it. See 16 Eliz. Dyer, 337. Lands given to a Parson and his Successors for to find Lights, and he Leaseh the same for life ; The Rent is so employed accordingly : The Incumbent dieth, The Successor accepteth the Rent ; the King grants it over, The Patentee shall avoid the Lease, as the Successor might have done before the Statute, if he had not accepted the Rent : but the acceptance before the Statute shall bind the Successor, for that it was but a voidable Lease. And the Case between Harvy and Thomas, which hath been put on the other side, serves to our purpose, for there the Conusee shall avoid a Lease in Law which is void ; and here, in the Principal Case, the Lease is void ; for that no Rent is reserved upon it. Wherefore, &c. It was adjourned.

Mich.

Mich. 29 & 30 Eliz. In the Kings Bench.

CCVI. *Beadle's Case.*

The Case was, That A. Leased to B. certain Lands for 40 l. per annum; And a stranger Covenanted with A. That B. should pay him 40 l. for the Farm and Occupation of the said Lands: A. brought an Action of Covenant; The Defendant pleaded, That before the day of payment, the Plaintiff put the said B. out of his Farm: It was moved by Godfrey, That the same is no plea; For this is a Collateral sum, and not for Rent issuing out of the Land: Also, the Defendant is a stranger to the Contract for the Farm. But the Opinion of the whole Court was clear to the contrary; For the Defendant hath Covenanted, That the Lessee shall pay for the said Farm and Occupation 40 l. so as it is as a Conditional Covenant, and here is Quid pro quo, and here the Consideration upon which the Covenant is conceived, scil. the Farm, and the Occupation of it, is taken away by the Act of the Plaintiff himself; and therefore the plea is good, and the Action will not lie. 2 Len. 115.

Pasch. 29 Eliz. In the Common Pleas.

CCVII. The Archbishop of York, and Morton's Case.

The Archbishop of York recovered in an Assise of Novel Disseisin, against one Morton, before the Justices of Assise; upon which Judgment, Morton brought a Writ of Error, returnable before the Justices of the Common Pleas; And after many Motions at the Bar, it was adjudged, That a Writ of Error upon such Judgment doth not lie in the said Court. (Which see 8 Eliz. *Dyer*, 250. See also, *N. B.* 22. c. That upon Erroneous Judgment given in the King Bench in Ireland, Error shall be in the Kings Bench in England, 15 E. 3. Error, 72. And Fenner, who was of Counsel with the Archbishop, demanded of the Court, How, and in what manner the Record shall be sent back to the Justices of Assise, so as the said Archbishop might have Execution? To which the Court answered, That the surest way is to have a Certiorari out of the Chancery into the Common Pleas directed to the Judges there; and then out of the Chancery by a Mitimus to the Justices of Assise: But Fenner made a doubt to take such Course for such remanding. Then Anderson, Chief Justice, said, Due Execution out of the said Record; for in as much as the Record came before us by Writ of Error, it shall also be removed and sent back by Writ. And so it was done. 1 Len. 54.

Hill. 29 Eliz. In the Kings Bench.

CCVIII. The Queen and Hurleston's Case.

2 Len. 194.

The Queen brought a Scire facias against Hurleston, to Repeal a Patent made to him of the Constableship of Chester, and Judgment was given for the Queen; And now Hurleston brought a Writ of Error against the Queen in the Kings Bench. And it was moved by Gawdy, Serjeant, That the Writ did not lie for the manner, for that he ought first to have sued to the Queen by Petition. See 22 E. 3. 3. & 23 E. 3. *Fitz. Error*, 9. If the King recover by an Erronious Judgment, a Writ of Error cannot be granted upon such a Recovery, sine gratia Regis speciali. And he said, That in Chester, they have Courts of Common Pleas, Kings Bench, Exchequer, and Chancery; And that if Judgment Erronious be given in the Chancery at Westminster, It cannot be reversed, but by Parliament; and so it is of an Erronious Judgment given in the Chancery at Chester. Also he said, They have a Custom in London, That within one month they may reverse their own Judgment. See 23 Eliz. *Dyer* 376. Erronious Judgment given in the 5 Ports, cannot be reversed in the King Bench; but it is reversible in the Court of the Guardian of the 5 Ports.

Clench, Here both the parties claim by the Queen, therefore there needeth no Petition; for, valeat quantum valere poterit, it is no prejudice to the Queen.

Cook, There needs no Petition here, for the Attorney General hath subscribed our Writ of Error.

Egerton, Solicitor General, It was the Case of Eliz. Mordant, who was to reverse a Fine levied during her Bonage; and the proceedings were stayed, because she had not sued to the Queen by Petition. See the Case of 24 E. 3. 35. the Case of *William de Ingularby*, who sued to reverse a Judgment given against him in a Writ of Conspiracy in the Eyre of Derby; and there it was said by Thorp, Justice, That he must first sue to the King by Petition.

Wray, An Outlawry may be reversed by bringing a Writ of Error, without suing Petition to the King.

Hill. 29 Eliz. In the Common Pleas.

CCIX. Beckwith's Case.

5 Co. 19.

Roger Beckwith by Indenture Tripartite, between him of the first part; William Vavalour, Frances Slingsby, and Elizabeth Sister of Roger, of the second part; George Harvey, and Frances Wife of the said George, (the said Frances being another of the Sisters of the said Roger) of the third part; Covenant with the aforesaid William Vavalour, and Frances Vavalour his Daughter, and

and with the aforesaid George and Frances, & cum quolibet & qualibet eorum, That the said Roger at the sealing and delivery of the said Indenture, was lawfully and solely seised of the Rectory of Aldingfleet in the County of York, discharged of all Incumbrances; Francis Vavafour took to Wife Frances Slingsby; And Note, That by the same Indenture, Roger Beckwith Conveyed the said Rectory to the said Francis Vavafour; Francis Slingsby and Frances his Wife, brought an Action of Covenant against the said Roger Beckwith; and assigned the Breach in this, That the said Roger was not seised of the said Rectory. And Note, That the Plaintiff declared of an Indenture bearing date at the Castle of York; And upon the breach of the Covenant, they were at Issue; which was found for the Plaintiff, and damages assessed, and Judgment given for the Plaintiff. And Note, That the Venire facias was, de Vicineto Castri de York. And upon that Judgment, a Writ of Error was brought in the Exchequer upon the new Statute; and Error was assigned, because all the Covenanters ought to have joyned in the Action of Covenant, notwithstanding those words; cum quolibet, & cum qualibet; which words do not make the Covenant to be several: And for that cause, the Judgment was Reversed. Another Error was assigned, because the Issue is not well and duly tryed; For the Issue is upon the seisin of the Rectory of Aldingfleet; in which case, the Venire facias ought to have been de Vicineto de Aldingfleet. And of that Opinion was Manwood and Anderson, Justices.

Hill. 29 Eliz. In the Common Pleas.

CCX. Young and Ashburnham's Case.

IN an Action of Debt brought by the Administrators of Young against Ashburnham; The Defendant pleaded, Nihil debet: And the Enquest was taken by default. And upon the Evidence given for the Plaintiff, the Case appeared to be this, That the said Young was an Innholder in a great Town in the County of Sussex where the Sessions used to be holden; And that the Defendant was a Gentleman of Quality in the Country there; And he, in going to the Sessions, used to lodge in the house of the said Young, and there took his lodging and his diet for himself, his servants, and horses: Upon which, the Debt in demand grew: but the said Young was not at any price in certain with the Defendant, nor was there ever any agreement made betwixt them for the same. It was said by Anderson, Chief Justice, That upon that matter, an Action of Debt did not lie. And therefore afterwards, the Jury gave a Verdict for the Defendant.

Hill. 29 Eliz. In the Common Pleas.

CCXI. *Heidon and Ibgrave's Case.*

1 And. 148.

A Writ of Right was brought by Heidon against Ibgrave; and he demanded the third part of 40 Acres of Land in the County of Hertford; and they were at Issue upon the meer Right. Upon which the Grand Assise appeared; And first the 4 Knights were specially sworn, to say upon their Oath, Whether the Tenant hath better right to hold the Land, than the Demandant to demand it. And afterwards, the rest of the Jurors were sworn generally, as in other Actions. And there was some doubt made, Whether the Demandant or the Tenant should first begin to give Evidence? And at the last, it was Ruled by the Court, That the Tenant should begin, because he is in the affirmative. And it was said by Periam, Justice, That so it was late adjudged in the Case betwixt Noell and Watts; And upon the Evidence, the Case was, That King Hen. the 8th by his Letters Patents gave to the Demandant the Mannor of New-Hall, and all the Lands in the Tenure and Occupation of John Whitton, before demised to Johnson, and in the Parish of Watford; And the truth was, That the said 40 Acres, whereof now the third part was in demand, were in the Occupation of the said John Whitton, but were never demised to Johnson, nor in the Parish of Watford: And by the clear Opinion of the Court, the said 40 Acres did not pass; for the circumstances of the Deed are not true, scil. the Demise to Johnson, and the being in the Parish of Watford; but both were false. But if the said Land had had an especial name in the Letters Patents, then it had been well enough, notwithstanding the mispension in the rest. And by Anderson, If upon the particular it had appeared, that the Demandant had paid his Money for the said 40 Acres, peradventure they had passed.

Hill. 29 Eliz. In the Common Pleas.

CCXII. *The Dean of Gloucester's Case.*

The Dean and Chapter of Gloucester brought a Writ of Partition, against the Bishop of Gloucester, upon the Statute of 32 H. 8. of Partition: And it was moved, That upon the words of the Statute, that the Action did not lie in this Case; for, the Statute doth not extend but to Estates in Joynt-Tenancy, or in Common of Lands whereof such Joynt-Tenants or Tenants in Common are seised in their own right. And also it is further said, That every such Joynt-Tenant, or Tenant in Common, and their Heirs, shall have Aid to deraign the warranty; without speaking of the word, Successors. And by Periam and Windham, Justices, The Writ doth

both not lie. But Anderson seemed to be of a contrary Opinion.

Hill. 29 Eliz. In the Common Pleas.

CCXIII. *Hare and Meller's Case.*

Hugh Hare of the Inner-Temple brought an Action upon the Case against Philip Meller, and declared, That the said Defendant had exhibited to the Queen a scandalous Bill against the Plaintiff, charging the said Hugh to have recovered against the said Defendant 400 l. by Forgery, Perjury, and Forswearing and Cosenage; And also that he had published the matter of the said Bill at Westm. &c. It was said by the Court, That the exhibiting of the Bill to the Queen, is not in it self any cause of Action; for the Queen is the Head and Fountain of Justice, and therefore it is lawful for all her Subjects to resort to her to make their complaints. But if a Subject after the Bill once exhibited, will divulge the matter comprised in it, to the disgrace and discredit of the person intended; the same is a good cause of Action. And so was the Case of Sir John Conway, who upon such matter did recover. And as to the words themselves, It seemeth to the Court, That they are not Actionable; For it is not expressly shewed, That the Plaintiff had used Perjury, Forgery, &c. And it may be, that the Attorney, or Solicitor in the Cause, hath used such indirect means, the Plaintiff not knowing it; and in such case the Plaintiff hath recovered by Forgery, &c. and yet without reproach: And by perjury he could not recover, for he could not be sworn in his own Cause. And Stanhops Case was remembered by the Court; which was, That Edward Stanhop of Grays-Inn brought an Action upon the Case against one who had Reported, That the said Edward Stanhop had gained his Living by swearing and forswearing; And by the Opinion of the Court, The Action did not lie; for those words do not set forth any actual forswearing in the person of the Plaintiff; but it might be in an Action depending between the Plaintiff and a stranger, that another stranger produced as a Witness had made a false Oath, without any procurement or practice of the Plaintiff; in which Case, it might be, that the Plaintiff had gained by such swearing.

Hill. 29 Eliz. In the Common Pleas.

CCXIV. *Cheverton's Case.*

Henry Cheverton brought a Quare Impedit, and Counted, That he was seised of the moiety of the Church of D. that is to say, To present qualibet prima vice; and that J.S. is seised of the other moiety; that is to say, To present qualibet secunda vice,

vice, &c. And Exception was taken to the Count, Because it was not shewed how the special Interest did begin; scil. by Prescription, Composition, or otherwise; for it is clearly against common Right, and therefore that ought to be shewed. See *Dyer*, 13 Eliz. 229.

Mich. 29 Eliz. In the Common Pleas.

CCXV. *Edmond's Case.*

IN an Action upon the Case against Edmonds, the Case was, That the Defendant being within age, requested the Plaintiff to be bounden for him to another, for the payment of 30 l. which he was to borrow for his own use; to which the Plaintiff agreed, and was bounden, ut supra, Afterwards, the Plaintiff was sued for the said Debt, and paid it; And afterwards, when the Defendant came of full age, the Plaintiff put him in mind of the matter aforesaid, and prayed him that he might not be damnified so to pay 30 l. it being the Defendant's Debt: Whereupon the Defendant promised to pay the Debt again to the Plaintiff: Upon which promise, the Action was brought. And it was holden by the Court, That although here was no present consideration upon which the Assumpsit could arise; yet the Court was clear, That upon the whole matter the Action did lie, and Judgment was given for the Plaintiff.

Mich. 29 Eliz. In the Exchequer.

CCXVI. *Farrington and Fleetwood's Case.*

2 Len. 55.
1 Len. 333.

BETWEEN Farrington and Fleetwood, the Case was, upon the Stat. of 31 H. 8. of Monasteries, The Abbot and Covent of D. 29 H. 8. makes a Lease of certain Lands for 3 Lives, to begin after the death of, one J. S. if they shall so long live: And afterwards, 30 H. 8. within a year before the Dissolution, they make another Lease to J. S. If the first Lease in the life of J. S. be such an Estate and Interest, which by vertue of the said Statute shall make the second Lease void, was the Question; For it was not in esse, but a future Interest.

Manwood, All the reason which hath been made for the second Lease is, because the first Lease is but a possibility; for J. S. by possibility may survive all the 3 Lives, and so it shall never take effect: But notwithstanding, be it a possibility, &c. or otherwise, It is such a thing as may be granted or forfeited, and that during the life of the said J. S. And Note also the words of the Statute, If any Abbot, &c. within one year next before the first day of the Parliament, hath made, or hereafter shall make any Lease or Grant for years, life, or lives of any Mannors, &c. whereof and in which any

any Estate or Interest for life or years at the time of the making of any such Lease or Grant, then had his being or continuance, or hereafter shall have his being or continuance, and then was not determined, &c. shall be void, &c. And here is an Interest, and that not determined at the time of the making of this Lease to J.S. And of that Opinion was the whole Court, and all the Barons, and divers other of the Justices; And therefore a Decree was made against that Lease, &c.

Mich. 29 Eliz. In the Exchequer.

CCXVII. The Master and Chaplains of the Savoy's Case.

The Master and Chaplains of the Savoy aliened a parcel of their possessions unto another in fee, and afterwards surrendered their Patents, and a Vacat is made of the Enrolment of them: It was now moved, how the Alienee should be adjudged to make title to the said Lands, claiming the same by the Letters Patents; for the Clerks would not make a Constat of it. for the Patents were cancelled, and a Vacat made of the Enrolment. And the Case of Sir Robert Sidney was vouched; in which Case, the Statute of 3 E. 6. was so expounded upon great advice taken by the Lord Chancellor; who thereupon commanded, That no Constat be made in such case.

Manwood, If Tenant in tail by Letters Patents of the King, surrendreth his Patent, and cancellereth it, and a Vacat be made of the Enrolment, by that the Issue in tail shall be bound; for no other person at the time of the cancelling hath Interest: But in the Case at Bar, a third person, scil. the Alienee hath an Interest; And therefore he was of Opinion, That he should have a Constat, &c.

Hill. 29 Eliz. In the Common Pleas.

CCXVIII. Incbely and Robinson's Case.

In an Ejectione Firmæ, It was found by Verdict, That King E. 6. was seised of the Mannor and Hundred of Fremmington; and granted the same by his Letters Patents to one Barnard in fee, rendering 120 l. per annum, and also to be holden by Homage and Fealty; And afterwards Queen Mary reciting the said Grant by King Ed. 6. and the Reservation upon it, granted unto Gertrude Marchioness of Exeter, the Mannor of Fremmington, and the said Rent and Services, and also the Mannor of Camfield, and other Lands and Tenements, Tenendum per vicessimam partem unius feodi Militis; Gertrude being so seised, Devised to the Lord Mountjoy the Mannor of Fremmington, the Mannor of Camfield, &c. And also bequeathed divers sums of Monies to be levied of the premises;

2 Len. 414
Owen Rep.
88.

misses. And further found, that the said Rent of 130 l. was the full third part of the yearly value of all the Lands and Tenements of the Devisor. The Question was, If by these words of the Devise of the Mannor of Fremmington, the Rent and the Services pass; i. e. the Rent, Homage, and Fealty reserved upon the Grant made by King Ed. 6. of the Mannor and Hundred of Fremmington; And if the said Rent and Services are issuing out of the Mannor: For if the Rent doth not pass, then the same is descended to the Heir of the Marchioness; and then being found the full third part of the value, the King is fully answered and satisfied, and then the residue of the Inheritance discharged, and is settled in the Devisee. And if the Rent doth not pass, then is the Heir of the Marchioness entituled by the Statute to a third of the whole, &c.

And Shuttleworth conceived, That if the Marchioness had Devised by express words the said Rent and Services, they could not pass; For as to the Services, they are things entire: as Homage and Fealty, they cannot pass by Devise in case where Partition is to follow; for such things cannot receive any partition or division, therefore not dividable: For the Statute enables the Proprietary to give or devise two parts of his Inheritance in three parts to be divided: As *Catalla Felonum* cannot be devised, for the reason aforesaid, *Quod fuit Concessum per totam Curiam*. But as to the Rent, the Court was clear, That the same was devisable by the said Statute; and in respect of that, the mischief of many distresses which the Common Law abhors, is dispensed with, and is now become distrainable of common right. And as to the Devise, he argued much upon the grounds of Devises; and put a ground put by *Fineux*, 15 H. 7. 12. Where every Will ought to be construed and taken according as the words purport, or as, it may be, intended, or implied by the words, What the intent of the Devisor was: so as we ought to enquire the meaning of the Testator out of the words of the Will. And see also a good Case, 19 H. 8. 8 & 9. And he much relied upon the Case of *Bret and Rigden*, *Plow. Com.* 343. See there the Case. So in this Case, for as much as such Intent of the Devisor doth not appear upon the words of the Will, that this Rent shall pass; It shall not pass, for there is not any mention of any Rent, in the whole Will. *Fenner*, argued to the contrary; and he argued much upon the favourable Construction which the Law gives to Wills. 14 H. 8. by Reversion, for remainder, &c. contra. 17 E. 3. 8. A Man may make a feoffment in Fee of a Mannor, by the name of a Knights Fee, a multo fortiori, in the Cases of Devises: And in our Case, the Marchioness conceived, That the Rent and Services reserved out of the Mannor of Fremmington, was the Mannor of Fremmington, and that the Law would give strength to that intent.

Walmesley conceived, That the Rent did not pass by the name of the Mannor, &c. for this Rent nec in veritate nec in reputatione was ever taken for a Mannor. Also the words, Of the Mannor of Fremmington

Fremmington and Hundred, are put amongst others which are Mannors in truth. By which he conceived, That the Devisor did not intend to pass but one Mannor, and no other Hereditaments, by this Mannor of Fremmington. There is a Rule in Law, That in the Construction of a Will, a thing implied, shall not control a thing expressed: But here, If by implication the Rent shall pass, then the Mannor of Camfield is not passed, which was the intent of the Testator to pass, and that by express words. See 16 Eliz. Dyer, 330. *Clatches Case*. No Implication of any Estate in remainder can serve when a special Gift and Limitation is made by the Devisor himself. See also, 16 Eliz. Dyer, 333. *Chapman's Case*. But in our Case here, there are not sufficient words to warrant any Implication; for neither in truth, nor in common reputation was it taken for a Mannor. 27 H. 6. 2. Greenacre may pass by the name of a Mannor, although it be but one Acre of Land, because it is known by the name of a Mannor. See acc. 22 H. 6. 39. And see, Where before the Statute of Uses, A Man had recoverors to his use, and he willeth by his Will, That his Feoffers sell his Lands; they might sell. And he said, That if a Man seised of a Mannor, parcel in Demesne, and parcel in Service, and he granteth the Demesnes to one and his Heirs, and afterwards deviseeth his Mannor, peradventure the Services shall pass; but this Rent hath not any resemblance to a Mannor.

Gawdy, This Rent shall pass by the name aforesaid. Favourable Construction is always given in Wills, according to the meaning of the Devisor, and no part of his Will shall be holden void, if by any means it may take effect; Then it here appeareth, that his intent was, That upon these words, something should pass to the Devisee concerning the Mannor of Fremmington; for otherwise, the words, Of the Mannor of Fremmington, are void and frivolous; which shall not be in a Will, if any reasonable Construction may be made; For it is found expressly by the Jury, That neither at the time of the Will made, nor at the time of the death of the Testator, the Devisor had any thing in the said Mannor of Fremmington, but the said Rent of 130 l. per annum. And it may well be taken, That the Devisor being ignorant what thing a Mannor is, thought that this Rent was a Mannor, because that he had Rents and Services out of the said Mannor. For in Construction of a Will, the words shall serve the intent; And therefore if a Man deviseeth, That his Lands shall be sold for the payment of his Debts, his Executors shall sell them; for the intent of the Devisor, names the sellers sufficiently. And See *Plowden*, 20 Eliz. 524. L. after the Statute of 27 H. 8. deviseeth, that his Executors shall be seised to the use of A. and his Assigns in Fee; whereas then there was no Feoffers to use: the same was holden a good devise of the Land to A. But the Justices conceived, That the Devisor was ignorant of the operation of the Statute in that case, and therefore his ignorance was supplied. See *Br. Devises*, 48. 29 H. 8. A. had Feoffers

Feoffees to his use; and afterwards after the Statute of 27 H. 8. and 32 H. 8. he willed, That his Feoffees should make an Estate to B. and his Heirs; It was holden by Baldwin, Shelley, and Mountague, Justices, That it was a good Devise. And see, 26 H. 6. *Fitz. tit. Feoffments & Fairs, 12.* A Carue of Land may pass by the name of a Mannor; therefore a fortiori a Rent; for Rents and Services have more affinity, and more resemble a Mannor, than a Carue of Land. And it cannot be intended, that the meaning of the Testator was, to grant the Mannor it self, in which he had not any thing, especially by his Will; for Cobin, Collusion or indirect dealing, cannot be presumed in a Will. Also, The Marchioness for 4 years together before her death, had the Rent and Services of the said Mannor; and she well knew, that she her self had not any thing in the said Mannor but the said Rent and Services, and therefore it shall be intended, that the same was her Mannor of Fremmington. A. seised of a Capital Messuage, and great Demesnes lying to it, Leased the same for years, rendering Rent, and afterwards devised to another all her Farm in such a place: And it was Ruled in that Case, That by that Devise, the Rent and the Reversion passed. See the Case between *Wrottesley and Adams*, Plow. 19. 1 Eliz. by *Anthony Brown and Dyer*.

Periam Justice, conceived, That this Rent might be divided well enough. But by Anderson, It is but a Rent-Deck. Periam, It is distrainable of Common right; Anderson doubted of it. But all the Justices agreed, That the Rent might be divided; but there should not be two Tenures. The Lord Mountjoy being advised, that this Rent did not pass, but descended to the Heir, being the full third part of the Lands, entered into the Residue, and made a Lease of the Mannor of Camfield unto the Plaintiff; upon which the Ejectione firmæ is brought: And afterwards, the Plaintiff seeing the Opinion of the Court to be against him, and for the Devise of the Rent, for the reasons aforesaid Discontinued his Suit, &c.

Mich. 29 Eliz. In the Common Pleas.

CCXIX. *Williams and Drew's Case.*

The Widow of Williams who was Speaker of the Parliament, brought Dower against Williams and Drew: upon the Grande Cape, Williams made default; And now came Drew and surmised to the Court, That he is not Tenant of the Land: But further he saith, That the Husband of the Demandant Leased the said Lands to him for 50 years, and that this Action is brought by Covin to make him lose his Term; and prayed to be received. And the Opinion of the whole Court, was, That although he was party to the Writ, yet he should be received, and that by the Statute

tute of Gloucester, for he is in equal mischief. And the Court was also clear of Opinion, That upon the default of Williams, the Demandant should not have Judgment for a moiety, for that the Cause of the receipt trenched to the whole. And by all the Justices, but Rhodes, If Judgment had been given upon the default of both, i. e. Williams and Drew, yet the Term of Drew should stand, but Drew should be put out of possession; and put to his Action. And Anderson conceived, That the Rescint upon that Statute did not lie, unless that Covin be alledged betwixt the Demandant and the Tenant, to make him to lose his Term; and that Covin is traversable: Which all the other Justices denyed; for the Covin ought to be averred, but ought not to be traversed. And also they all but Anderson, were clear of Opinion, That in this Case of Receipt, the party shall not plead upon his Receipt; as upon the Statute of Westminster; but he shall be received, and have day to plead.

Mich. 29 Eliz. In the Common Pleas.

CCXX. *Dicksey and Spencer's Case.*

The Case between Dicksey and Spencer, see H. 29 Eliz. Notwithstanding the Opinion of the Court of Common Pleas, The Mayor and Aldermen of London reversed the Judgment given in an Assise of Freshforce; Upon which, Dicksey sued a Commission, directed to Anderson, Manwood, and Periam, to examine the said Judgment, & ad errorem corrigendum. And the Case was often Argued; The principal matter was, That Lessee for years in an Action of Debt brought against him for the Rent reserved, claimed Fee by bargain and sale of his Lessor; the which bargain and sale the Plaintiff traversed. And it was argued, Because this bargain and sale was traversed, there was not any forfeiture in the Case; for upon that, both parties are at large. As in a *Præcipe quod reddat*, The Tenant disclaims, and the Demandant avers him Tenant, he shall not enter for that Disclaimer. But all the three Justices were clear of Opinion, That notwithstanding the Traverse, it is a forfeiture; for the very claim is a forfeiture, which cannot be saved by matter subsequent. See 9 H. 5. 14. If Tenant for life be impleaded in a Writ of Right, and joins the Issue upon the meer Right, it is a forfeiture. Another Error was assigned; Because where it is found, that both the Defendants Disseisvunt the Plaintiff, but Spencer only with force, and the Judgment in the Assise of Freshforce was, that *ambo Capiantur*, where no force is found in Clark, one of them; yet such a Judgment is good enough: For the Assise have found a Joynt Disseisin, and that Clark was present at the said Force; and then he particeps Criminis. And of that Opinion were all the 3 Justices. And it was Objected, That soasmuch as Clark is Convicted of force upon the matter,

matter, ſoꝛ both ought to be taken, therefore the Damages ought to be trebled againſt both; And the Court was in ſome doubt of that: But clearly, the Incrementum ſhall be trebled, as well as the Damages tared by the Aſſiſe; And after many Arguments, the ſaid Juſtices moved the parties to a friendly courſe, to compound the matter: Foꝛ if we reverse the Judgment given in the Huſtings, Then Spencer may have his Writ of Error upon the Judgment in the Aſſiſe of Freſhforce, & ſic infinite. And afterwards, the parties put themſelves to the Mediation and Order of the ſaid 3 Juſtices, who at length made an end of the matter betwixt the ſaid parties.

Mich. 29 Eliz. In the Star-Chamber.

CCXXI. The Lady Newman and Shyriſſ's Caſe.

4 Len. 25.

The Lady Newman, Siſter of James Wingfield lately deceased, Exhibited a Bill of Complaint in the Star-Chamber, againſt one Shyriſſ dwelling in Ireland, and two others; ſetting forth, That the ſaid Shyriſſ had forged a Deed, purpoꝛting, That the ſaid James had by the ſeme given to him all his goods; and alſo that the ſaid James had aſſigned to the ſaid Shyriſſ a Leaſe foꝛ years of Lands in Ireland: And alſo that the ſaid Shyriſſ had procured the ſaid two other Defendants to depole upon their Oath befoꝛe the Town-Clerk of London, That the ſaid Deed was ſealed and delivered by the ſaid James as his Deed. It was moved by the Counſel of the Defendant's, That theſe matters of Forgery are not within the Statute of 5 Eliz. noꝛ alſo the Perjury, oꝛ the procurement of it: Whereupon the Lords of the Council referred the Conſideration of the ſaid Statute, to both the Chief Juſtices, who the next Court-day declared their Opinions upon the ſaid Matters; 1. That the ſaid Statute did not extend to forgery of a Deed conveying a gift of Chattels personals: Which ſee by the Statute, which, as to that point, extends but to Obligations, Bills Obligatory, Acquittance, Release, oꝛ other diſcharge. And alſo a Deed of an Aſſignment of a Leaſe of Land in Ireland, is not within the ſaid Statute. And alſo the ſaid Juſtices were of Opinion, That this Perjury, and the procurement of it, is not puniſhable by the ſaid Statute, becauſe the Oath was taken Coram non Judice. Foꝛ the Town-Clerk of London cannot miniſter an Oath in ſuch caſe, no moꝛe than a private perſon. But becauſe the Bill in the percloſe and Conclusion of it, was contrary to the Laws and Statutes of this Realm, The ſaid Chief Juſtices were of Opinion, That the ſaid Court might puniſh thoſe offences as miſde-meanors at the Common Law, but not according to the Statute. And afterwards Shyriſſ paid foꝛ a Fine 3 l. and by Order of the Court, was ſet in the Priſon.

Mich.

Mich. 29 Eliz. In the Kings Bench.

CCX XII. *Middlemore's Case.*

Middlemore brought an Action upon the Case for these words; scil. *Middlemore* is a Cosening Knave; for he had me to *Coventry*, and there cosened me of 40 s. And afterwards had Judgment to recover; And now the Defendant brought a Writ of Error in the Exchequer-Chamber; and there the Opinion of the whole Court was, That the said words were not actionable. And the Case of one *Egerton* was remembred, Thou art a Cosening Knave Coroner, For thou hast Cosened me of my Land. The Plaintiff in that Case could not have Judgment; For he was not particularly charged in respect of his Office. And Note; That in this Case of Error, the Defendant pleaded an Outlawry in the Plaintiff; and being barred in that, he pleaded now an Excommen- gement in the Plaintiff, and shewed the Letters of Excommu- nication: Upon which it appeared, That the Plea was pleaded be- fore the Outlawry was pleaded: And it was Ruled by the whole Court, That this Plea lieth not for the Defendant; For he can- not have two Pleas to the person of the Plaintiff, but where his second Plea is matter of later time since the first Plea: And af- terwards the said Judgment was reversed.

Mich. 29 Eliz. In the Exchequer.

CCX XIII. *Barns* Executor of the Bishop of *Durham* and *Smith's* Case.

Emanuel *Barns*, Executor of *Barns* late Bishop of *Durham*, 2 Len. 21. brought Debt for Arrearages of Rent reserved upon a Lease for years of certain Mines demised to *Smith*; scil. Mines called *Argill*, and Mines called *Greenbourn*; and it was against the Executors of *Smith*. The Defendant pleaded, as to parcel, Non detinet; and as to other parcel of the Arrears, That in the Inden- ture of demise, there is a Covenant, Quod si contigerit, that the said Lessee impeditus fuerit quominus Mineris prædict. gaudere possit, That then so much of Rent should be deducted, amounting to the value of the Mines he could not enjoy, &c. And pleads in fact quod impeditus fuit, quo minus gaudere potuit Mineris prædictis, &c. And it was found for the Plaintiff. And it was moved by *Cook* in arrest of Judgment, That here is not any place shewed, where these Mines were, so as Non constat from what place the Visne shall come: As if in an Action (as here) the Plaintiff De- clares of a Lease made of Land called *R.* in such a County, the same is not good, *Causa qua supra*. The Issue here is Non potuit fodere in prædicta Minera de *Greenbourn*, by the space of 7 years and

and a half. From whence shall the Visne come for the tryal of this? Not from Durham where the Lease was made, for there is no nearness between the place where the Lease was made, and this Issue: But if the Issue had been, That the Lessor had not any thing in the Mines tempore dimissionis, it might have been tryed where the Lease was made.

Another Exception was taken, because the Plea is, Quod non potuit fodere in 3, 4, 5, 6, 7, 8. dimidio 10 & 11. and that appears to be 7 years and a half; And the Jury find, Quod non potuit fodere per spatium 7 annorum tantum, without speaking of the half year, and so they have not given a full Verdict.

As to the first Exception, It was said by Cook, If a thing be alledged in pleading, which is Issuable, and there is not laid down any place of it, although that no Issue be joyned upon it; yet because he hath prevented the other of his Plea to it, Judgment given in such case shall be reversed: And so it was Ruled between Matthew and Stranham. So upon the Statute of Usury, the Informer charged the Defendant, For that by way of corrupt bargain, he had received so much, and did not shew the place, although that no Issue was joyned upon it, but they were at Issue upon another point; yet if Judgment in such case be given, it shall be reversed.

And in all Actions upon the Case, where request is necessary, and the Plaintiff ought to alledge it, the place of the Request ought to be shewed. And he said, That this Issue ought to be tryed where the Mines demised are, and here no place is alledged where the Mines are, but only in Com. Dunelmens. and yet a Visne of the City of Durham hath tryed this Issue, which ought not to be; but the Visne should come de Corpore Comitatus.

Clark, Baron, If Issue be joyned upon taking of the profits, it shall be tryed where the Land is, but non Debet or Detinet where the Lease was made: so, Ne lessa pas.

By Cook, The Issue is, Non potuit fodere, and that is local, therefore it shall be tryed where the Mines are.

Manwood, Non potuit fodere, non potuit gaudere, are not local; but non fodit, non gavissus fuit, is local, and shall be tryed where the Mines are. And here it is not shewed, how he was hindered to dig, &c. and the Issue is, de potentia & non de actu.

Tanfield, As to that which Cook hath said, That the Visne in this Case shall come de Corpore Comitatus; It is not so, for such Visne never shall be, but where the Issue is, No such Town, Hamlet or place known. Tanfield, In another Case, the Tryal shall be de Corpore Comitatus; As in False Imprisonment, The Defendant justifies, That the common voice and fame was, &c. there the Visne shall be de Corpore Comitatus, 11 E. 4. 4 & 5. And see also, 21 Eliz. the Case of *Constantine and Gynne*, (which see now Reported by the Lord Cook, in *Dowdell's Case*) Cook 6. Part, 48. And as to the defect of the Verdict, upon the half year, the Record is not so,

for

for the Record is, Dimidio anni decimi, & undecimi, and so two half-years, make one whole year, and so but 7 years in which the disturbance is supposed to be done. And see as to the *Visne de Corpore Comitatus*, 22 E.4.4. *Fitz. Visne*, 27.

Another Exception was taken, because the Declaration is, That the Lease was made at *Durham in Comitatu Dunelm.* and doth not say also in *Setberg*, for such is the name of the County Palatine. But as to that it was said, Every Writ of Execution which goes into the County Palatine, is directed *Episcopo Dunelm. & Cancellario suo*, *Quod det in mandatis Vicecom. suo*, &c. And *Durham* was called *Setberg* in Ancient time, and the name of the County Palatine there is commonly called *Dunelm.* & *Setberg*; and their Pleas there are entred, *Placita coram Justiciariis Dunelm. & Setberg*, but the same is amongst themselves only, and all directions from hence to them are, *Episcopo Dunelm.* without any mention of *Setberg*; and a President was shewed to the Court to such effect.

Manwood, Levied by Distress, and so nothing arrear, shall be tryed where the Lease is made.

Clark, That is true, for by the (So) the Plea before is waived. And see 8 H. 5. 10. Where an Issue is to be tryed in *Lincoln*, &c. of such a Town which is a Franchise, The *Venire facias* shall be of *Lincoln*, and not de *Vicineto Lincoln*; for then the Jury should be as well of the County adjoining, as of *Lincoln* it self; which the *Visne* of *Lincoln* cannot do: But *Venire facias de Suburbis* of *Bristow*, was awarded good.

And if in the Case at Bar, the Defendant had pleaded, That the Plaintiff had entred into part of the Mines, and so suspended his Rent, upon which they are at Issue, the same by *Manwood*, shall be tryed by a Jury de *Corpore Comitatus*: The Issue here is, If the Defendant might enjoy these Mines *secundum veram intentionem dimissionis prædictæ*. and that is referred to the Demise which was made at *Durham*, and therefore this Issue may be well tryed there. And afterwards at another day, It was holden, That all the Issues are Jeofails. But as to the want of the place, the same was holden a material Exception. See the Case of Mines, *Plow.Com.* 337. Exception was taken to the Information, because it was not laid down there, in what Town or Hamlet *Newlands* lay. And it was holden, The same had been a material Exception, if the Defendant had not demurred upon the Information; in which case, no Tryal by Jury is to be, &c. And he said, *Misnomer* shall be tryed, where the Writ is brought, &c. so never administered as Executors, &c.

Manwood, Here the Lease is said to be made at *Durham* in a place certain. If then there be not any other local thing said which may draw the Tryal elsewhere, it shall be tryed at *Durham* where the Lease is made. An Infant makes a Lease for years, rendering Rent, and afterwards re-enters, and avoids his Lease by reason of

of his Nonage, and title is found against him by that Lease, upon which he pleads Nonage, it shall be tryed where the Lease is made, &c. And afterwards, Judgment was given for the Plaintiff.

Mich. 29 Eliz. In the Exchequer.

CCXXIV. *Blunt and Ward's Case.*

Where an Order was made, That such a one should have the mean profits and issues of such Lands; It was holden, The same is not to be intended, That the party shall have the Crop which grows upon the Land by the manurance of another, but the value of the Land as it might be Leased. And so it is where the Sheriff returns Issues, &c. for the Corn there growing may be of the value of 40 l. where the Land is but of the value of 10 l.

Mich. 29 Eliz. In the Kings Bench.

CCXXV. *Westborn and Mordant's Case.*

2 Len. 103.

1 Cro. 191.

199.

1 Len. 247.

In an Action upon the Case, the Plaintiff declared, That whereas he was possessed of a piece of Land containing 2 Acres, called Parsonage, lying adjoining to a certain River, from the 20th of May, 29 Eliz. usq; diem impetrationis istius Brevis, &c. the Defendant had the said 20th day of May estopped the said River, with certain Loads of Earth, and so continued estopped until the 14th of February, by reason of which his Land was drowned, and so he had lost the profit of it for the said time. It was moved in Arrest of Judgment, That upon the Declaration it doth not appear, that there is any cause of Action, for the Plaintiff hath made title to the Land drowned from the 20th day, so as that day is excluded, and the Rulance is laid to be done the said 20th day: and if so, then he cannot complain of any wrong, the Rulance being laid to be before any possession of the Plaintiff. To which it was answered, That although the stopping was made before the possession, yet the Continuance of it after is a new wrong, for which an Action lieth. As 5 H. 7. 4. It was presented, That an Abbot had not cleaned his Ditch, &c. by reason of which, the Highway is estopped, The Successor shall be put to Answer to that Indictment by reason of the Continuance of it. See, that continuance of a Rulance, is Quasi a new Rulance, 14 & 15 Eliz. Dyer, 320. And it may be, that the Plaintiff was not damaged, until a long time after the 20th of May, scil. after the Estopping; and the words of the Writ here are satisfied and true. Afterwards, Judgment was given for the Plaintiff.

Mich.

Mich. 29 Eliz. In the Common Pleas.

CCXXVI. The Queen and Scot's Case.

The Queen brought a Quare Impedit against the Bishop of London, and Scot; And the Case was, A. seised of an Advowson in gross holden of the Queen in Chief, aliened the same by Fine without Licence of the King: The Church became void; The Conussee presented; the Queen without Office found brought a Quare Impedit: The Question was, If the Queen without Office found, should present? It was agreed by the whole Court, That if the alienation had been by Deed only, there the Queen without Office should not have the presentment; For upon such alienation by matter in fait without Licence, no Scire facias shall issue without Office found of the alienation. But upon Alienation without Licence by matter of Record, a Scire facias lieth before Office. And in the last Case, the Queen shall have the Issues from the time of the Scire facias returned; but in the first Case, from the time of the Office found. See *Stam. Prerogat.* see 8 E. 4. 4. It was then moved, That if the Queen, being entituled to present ut supra, pardon the Conussee all alienations without Licence and Intrusions, If the Estate of the Incumbent thereby be confirmed? But the Court would not argue that Point.

Mich. 29 Eliz. In the Common Pleas.

CCXXVII. *Sir Thomas Holland and Bonk's Case.*

In a Replevin, the Defendant made Conusans as Bailly to Tho. Lord Howard, and shewed, That the Priors of the late dissolved Priory of Hallywell was seised of the Mannor of Priors in the County of Hertford, and granted the same by words of Dedi & concessi pro certa pecunie summa to the Lord Audley, Chancellor of England, and his Heirs, who died thereof seised; and that the said Mannor (inter alia) descended to Mary, Daughter and Heir of the said Tho. Lord Audley, who died thereof seised; by force of which, the said Mannor descended to the said Tho. Lord Howard, &c. And shewed, That the Conveyance by the Priors bore date, 4. Novemb. 29 H. 8. and then enrolled in the Chancery. The Plaintiff in bar of the said Conusans, shewed, That after the making and inrolling of the said Conveyance, the said Priors Leased the Lands to Sir Hen. Parker for 99 years, and conveyed the said Lands to himself; and further shewed, That the said Conveyance specified in the Conusans, fuit primo deliberatum 4. November, 31 H. 8. without that, that the said Priors, the said 4. Novemb. 29 H. 8. dedit & concessit, the said Mannor to the said Lord Audley. Upon which it was demurred. And it was the clear

1 Len. 183.
2 Len. 12.
Owen Rep.
138, 139.

clear Opinion of the Court, That the Averment de primo deliberatum against a Deed enrolled, ought not to be received. For by the same reason, it might be averred, Nunquam deliberatum; and so upon the matter, Non est factum.

It was further Objected, That a Bargain and Sale by a Corporation is not good; For a Corporation cannot be leased to another's use; and the nature of such a Conveyance is to take effect by way of use in the bargain, and afterwards the Statute draws the possession to the use: But the Court utterly rejected the said Exception as dangerous, for that such were the Conveyances of the greater part of the possessions of Monasteries. And it was in this Case said by Shuttleworth, Serjeant, That although such a Corporation could not take an Estate to another's use; yet they might charge their own possessions with an use to another.

Trin. 29 Eliz. In the Kings Bench.

CCXXVIII. The Queen and the Bishop of
Gloucester's Case.

The Queen recovered in a Quare Impedit against the Bishop of Gloucester, and one S. in which Quare Impedit, the Bishop pleaded as Ordinary; scil. Quod ipse nihil habet nec habere clamat in Ecclesia prædicta neq; in Advocacione ejusdem nisi Admissionem, Institutionem, &c. And now the Bishop and S. the Incumbent brought a Writ of Error; And, If this Writ of Error brought jointly by the Bishop and the Incumbent, was well brought, was the Question? Some held, That the Bishop had not cause to bring Error, for that he had disclaimed in the Church, and the Patronage of it: For if in a Præcipe quod reddat the Tenant disclaims, he shall never have a Writ of Error. 16 E. 3. 7. Fitz. Error, 78. And Note, That in the Writ of Error at the Bar, the perclose was, Ad grave damnum Episcopi; whereas the Bishop could not be grieved by the said Judgment, because he had nothing, nor claimed any thing in the Church, &c.

Wray, The Writ of Error had been the better, if those words, (ad grave damnum Episcopi) had been left out, for the Bishop hath lost nothing.

And it was Objected by some, If the Judgment in this Case be reversed, the usual Judgment cannot be given; scil. That the Bishop shall be restored to all which he lost, &c.

Wray, The Bishop shall joyne for Conformity of Law, and for privacy of Record; and the Plea of the Bishop is not so strong as a Disclaimer: For in case of a Disclaimer, the Judgment is, That the Plaintiff shall take nothing by his Writ; but in the case of the Bishop here, the Judgment is, Quod querens recuperet præsentationem suam versus dictum Episcopum ad Ecclesiam prædictam.

See

See 35 H.6.4. Fitz. Error, 35. And afterwards in the principal Case, the Writ of Error was awarded good.

Trin. 29 Eliz. In the Kings Bench.

CCXXIX. *Williams and Linford's Case.*

EDward Williams brought an Action upon the Case against Linford, for slanderous words concerning the Title of the Plaintiff's Lands; viz. *Williams* is nothing worth; and do you think that the Mannor of *D.* is his? It is but a Compact betwixt his Brother *Thomas* and him. And declared further, That at the time of the speaking of these words, there was a Communication with one *J.S.* to give the said *J.S.* the said Mannor of *D.* for his Mannor of *R.* and that by reason of the said slanderous words, the said *J.S.* durst not proceed in the said intended exchange. It was objected, That upon this matter, an Action upon the Case did not lie; because the slanderous words were not spoken to him who should be purchaser of the Lands, but unto a stranger: For in the Case betwixt *Smith* and *Johnson*; *Johnson* was in speech with one to sell his Land to him, and *Smith* said to him who should be the purchaser of them, Will you buy *Johnson's* Land, Why, it is troubled with more Charges and Incumbrances then it is worth? 2 Len. 1176
1 Cro. 346
787.

Wray, There is not any difference, be the words spoken to the parties, or unto a stranger; for in both Cases, the Title of the Plaintiff is slandered, so as he cannot make sale of it. It was adjudged for the Plaintiff.

CCXXX. *Mich. 29 Eliz. In the Common Pleas.*

A Poor Woman brought an Action of Trespass for breaking of her Close, and declared of a Continuance by 6 years: And upon *Nihil dicir*, had Judgment to recover: Upon which a Writ of Enquiry of Damages issued forth; and now came the Woman and shewed to the Court, That the Jury had found too little Damages; scil. but 40s. whereas the Land was worth 5 l. per annum, and that the Trespass had been continued for 6 years; and prayed, that the said Writ might not be received, and that the Court would award another Writ to have a better Enquiry of the Damages. But the whole Court denyed it; for so there might be infinite Enquiries.

But some time at the request of the Defendant, when excessive Damages are found, or any misdemeanour is alledged in the Plaintiff, in procuring, or using such a Writ of Enquiry of Damages, We use to relieve the Defendant with a new Writ, but never the Plaintiff, because it is his own Act.

And by *Rhodes*, The late Countess of *Darby* brought a Writ of Dower, and had Judgment to recover; and she surmised, That

her Husband died seised, and prayed a Writ of Enquiry of Damages, and had it: And because too small Damages were found, she would have suppressed the said Writ, and procured another; but she could not have it. And at the last, she was driven to bring in the said Writ. Which she did accordingly.

Mich. 29 Eliz. In the Common Pleas.

CCXXXI. *Lawson and Hare's Case.*

2 Len. 74.

IN a Replevin by Lawson against Hare of the Temple, who Avowed, because he himself was seised of a Hundred; And that he himself, and all those whose Estate he hath in the said Hundred, have used to hold a Leet within the said Hundred at such a place every year; And that at every time such Leet should be holden, The Inhabitants within the said Precinct have used to pay to the Lord of the Leet, 16 d. for the Leet-fee; and that they have used to distrain for the same: And shewed, That at a Leet there holden 5 July, 26 Eliz. &c. The Plaintiff replied, abiq; hoc, that they used to distrain; And it was found for the Defendant. And it was moved in arrest of Judgment, Because the Defendant in making his Title to the Leet by Prescription, Conveys the Hundred to him by a Que Estate, without shewing a Deed of it. See 11 H. 4. 242. Quod fuit concessum per Anderson & Windham. Periam and Rhodes, contrary; But if the Hundred it self had been in Question, then the Exception had been material, but here the Defendant intitles himself to a thing by reason of the Hundred, and then it is sufficient for him to say, That he is seised of the Hundred, be it by right, or by wrong. Admit, That by this not shewing, the Avowry be vitious and defective, It is to be considered, if it be not helped by the Statute of Jeofail's, 18 Eliz. And therefore it is to be considered, If an Avowry be within the meaning of the said Statute.

1 Cro. 217.
245.

Anderson, Although that the Avowant be quasi an Actor to have a Return of the Cattel, if the Distress be adjudged lawful; yet in truth he is Defendant, and not Plaintiff; And if the Defendant will justify the taking, and not avow, he is merely Defendant: And although that he avow to have a Return, yet he cannot be said Plaintiff, no more than the Tenant who voucheth over another to recover in value, may be said Plaintiff. And therefore an Avowry cannot be said a Count, or Declaration, but a Answer to the Count, or Declaration.

Windham and Periam conceived, That an Avowry is within the Statute; For it comprehends title: And an Answer to an Avowry, is said a Bar to an Avowry; and an Avowry is in the place of a Declaration. Admitting, That an Avowry is within the Statute; If the not shewing of the Deed be such a defect which may be helped by the Statute.

Anderson conceived, That it was: But the Plaintiff might have

have demurred upon the Avowry, for not shewing of the Deed, and have had judgment. But when he hath traversed the Prescription as to the point of the distress, and the same is found against him, Now it shall be intended that the Avowant hath a Deed, although he hath not shewed it.

Windham, The Title of the Avowant to the Hundred, is the Foundation and ground of the Suit; for if the Avowant hath not a Deed to make him a sufficient title to the Hundred, he cannot have the Leet; and if no Leet, then no Leet-Fee; and then the Avowant hath no cause to distrain.

Another Exception was taken to the Avowry, because the Avowant hath not shewed any Seisin of the Leet-Fee.

And by Periam, Such a seisin ought to be shewed in some person certain. For although it needs not always to lay a Seisin, in shewing by whose hands the seisin was had, (for the Inhabitants are charged, and no person certain) yet the seisin ought to be laid in a person in such sort as it may be laid: and therefore in this Case, forasmuch as the seisin cannot be shewed by the hands of the Inhabitants, it ought to be laid in the Lord. See 4 H. 6. 29. Br. Avowry, 71. In a Recordare the Defendant avowed, because the King is seised of the Castle of C. in jure Ducatus sui Cornub. to which he had 20 s. Rent out of the Town of D. Solvend. annuatim at Michaelmas, of which Rent, the King and all the Dukes of Cornwall aforesaid had been seised time out of memory, &c. by the hands of the Inhabitants of the same Town, &c. and the same was holden a good Avowry. For although that seisin ought to be laid in some person certain by his hands; yet in that case it is good enough; For the seisin by one of the Inhabitants, is the seisin of them all.

And in the principal Case by Periam and Walmesley, It was agreed, That the seisin here was well enough confessed; For when the Plaintiff hath taken Issue, That they have used to distrain, all other matters are holden confessed, because that the Plaintiff hath not saved them to him by protestation. Which Rhodes granted.

Another Exception was taken to the Avowry, because that the Leet by it is supposed to be holden in July; therefore void: which see, Magna Charta, 35.

But it was holden by Anderson, Windham, and Rhodes, That by reason of this Prescription, the Court is well holden in July, notwithstanding the said Statute of Magna Charta, and it might be holden at what day he pleased; For his Liberty and Election is not restrained by the said Statute, and such is the common experience. And note the words of the same Statute, Ita quod quilibet habeat Libertates suas quas habuit, vel habere consuevit, tempore Regis H. avi nostri, &c. vel quod postea perquisivit, &c.

And Rhodes conceived, That the said Statute is to be intended of Turns only, and not of Leets. Which see, 24 H. 8. Br. Leet, 23. in the end of the Case.

But by Periam, A Leet cannot be holden but according to the

said Statute, for to that purpose was the said Statute made: But if a Leet hath been time out of mind, &c. holden at any other day than that which is limited by the Statute, it is a good prescription, and it is saved by the Statute. The Prescription is, That he and all, &c. have used to hold a Leet once in a year, and hath not shewed when the said year begins; for it may be, that a Leet hath been holden there in this year before July, and then this is a void Leet, and so no Leet-fee due; and of that Opinion was Periam, viz. That the Abowant ought to have shewed the beginning and end of the year, viz. That he held the said Leet pro uno anno finito, such a day: for it may be he hath holden two Leets in one year: But it was said by the other Justices, That that shall come on the other side; for prima facie it shall be intended that it hath been but once holden in the same year, until the contrary be shewed.

And Note, by Anderson and Rhodes, If the King grants to one a Leet to hold semel quolibet anno, without saying, At the Liberty of the Grantee, the Grant is good, and the Grantee may hold it at what day he pleaseth.

Mich. 29 Eliz. In the Kings Bench.

CCXXXII. *Putnam and Cook's Case.*

2 Len. 129.
193.
1 Cro. 52.

IN Ejectione Firmæ, It was found, That one Hawkins was seised of 3 Messuages in Bury in Fee, and had Issue Robert his Son, and Christien and Joan, Daughters; And Devised all his said Messuages to his Wife for life, the remainder of one of the said Messuages to his Son Robert and his Heirs; the remainder of another of his said Messuages to his Daughter Christien and her Heirs; the remainder of the third to Joan and her Heirs; And further willed, That if any of his said Issues died without Issue of his body, that then the other surviving should have totam illam partem, &c. between them equally to be divided. The Devisor died; The Wife of the Devisor died; Joan died having Issue; Robert died without Issue; Christien entred into the whole Messuage of Robert, and died; and her Husband held in as Tenant by the Curtesie.

Cook, The surviving Child shall have the whole, and the Issue of Joan shall have nothing. And he conceived, That by this Devise they have an Estate in tail; for the Fee is not vested in them, for that it is incertain which of them shall survive: but when one doth survive, then he shall have the Fee; for these words, totam illam partem, go to the whole Estate, as well as to the whole Land. If I Devise my whole Land to J.S. he hath a Fee. And he conceived, That the three had an Estate in tail with a Fee expectant, each severally to the House limited to him.

Golding, contrary; Each of them hath an Estate tail in the House Devised to him, and but an Estate for life expectant upon the

the death of the other without Issue; for there are no words by which it might appear what Estate they shall have by the Survivor, &c. I grant the Case which Perkins denies, but Littleton affirms; scil. A Devise of Lands to one in perpetuum; for there the intent appeareth: but where there are not words of Inheritance, nor words amounting to so much, then it shall be but an Estate for life; And as to these words, totam illam partem, the same is all one, as if he had Devised, totam illam, without partem. Also he conceived, That where one only survived, no estate further vested, for there ought to be two to take by the Survivorship; for the words are, equaliter inter eos dividend. And then if it cannot accrue by Survivor, then it shall descend: And if it had accrued by Survivor, they should thereof have been Tenants in Common, and not Joint-Tenants, by reason of these words, equaliter dividend.

Clench, Justice, The words, totam illam partem, go to the House, and not to the Estate in it.

Shute, to the same intent, If both the Daughters had survived; they should have Fee in the House of Robert, but not by the Will; but by descent in Coparcenery. Also when two are dead, the Son and one Daughter, then it cannot be decided; therefore the Will as to that is void, and then the Common Law shall take place, and put the Possession to the Issue of one Daughter, as to the Sister surviving.

Gawdy, Justice, Here is but an Estate for life in the survivor. It hath been Objected, That then being but an Estate for life, that Estate is drowned by the descent of the Fee simple, so as now the Estate limited by the Will, is void. To which it may be answered, That although now upon the matter it be void, yet ab initio, it was not so, for it became void by matter of later time; scil. by the descent of the Fee simple; for if one of the Daughters had died without Issue before the death of Robert, so as the House of such Daughter had come to Robert and the other Sister; there had been no Coparcenery, for the Son had all the Fee, and the moiety of it is executed, and the moiety expectant, and the Sister hath the moiety for life; and then the Devise is not good. Also here are two survivors, so as nothing is to be divided, and therefore the Law shall say, That the House of Robert is descended, scil. the Fee of it to the Daughter of Christien and Joan. And so Judgment was given against the Husband, who claimed to be Tenant by the Curtesy of the whole Land and Possession.

Mich. 29 Eliz. In the Kings Bench,

CCXXXIII. Large's Case.

2 Len. 82.

IN an Action upon the Case, the Case was this; A. seised of Lands in Fee, Devised the same to his Wife, till William his younger Son should come to the age of 22 years, the remainder when the said William should come to such age, of his Lands in D. to his two Sons Alexander and John, the remainder of his Lands in C. to two other of his Sons, upon Condition, Quod si aliquis dictorum filiorum suorum circumibit vendere terram suam before his said Son William should attain his said age of 22 years imperpetuum perderet eam. And before such age, two of his Sons Leased their parts which accrued to them by the Will of their Father for 60 years; and so from 60 years to 60 years, till 240 years were expired: It was Argued by Bois, That Alexander and John are Joynt-Tenants, and not Tenants in Common; notwithstanding the Opinion of Audley, 30 H. 8. *Br. Devises*, 29. And he argued also, That the said Leases from 60 years to 60 years, is not within the Condition of the Devise, for it is not a sale from which they only are restrained: and so is it of a Joynture made by any of the Sons to their Wives.

On the contrary, It was argued, because this remainder doth not vest presently, for it is incertain if it shall vest or not; For if William should die before he came to the age aforesaid, it was conceived, that the remainder was void. 34 E. 3. *Fitz. Formedon*, 68. A Man deviseth Land to his Wife for life, so that if the said Wife be disturbed, that the Land shall remain over in Fee; scil. to D. here is not any remainder until the Wife be disturbed. So a Devise unto a Woman so long as she shall remain sole; and that then it shall remain to B. here this remainder shall not begin till the marriage: And this Condition of restraint of Alienation is good, for he is not altogether restrained, but for a time, scil. until his Son shall come to the age of 22 years: As a Feoffment upon Condition, That he shall not alien to J.S. See 29 H. 8. *Br. Mortmain*, 39. A Lease made for 100 years, and so from 100 years, to 100 years, until 800 years be expired, is Mortmain. And see the Statute de Religiosis, The words are, emere præsumat, & vendere. A Lease for years is within such words, emere, & vendere. Also, by this Lease, the Will is defrauded; and where the Statute of Gloucester, Cap. 3. Wills, That if a Man aliens Tenements which he holdeth by the Law of England, with warranty, the Son shall not be barred; and yet if Tenant by the Curtesie be disseised, to whom he releaseth with warranty, the same is within the said Statute: and yet a Release and an Alienation are not

not the same, because they are in the like mischief; and if the Sons might make a Lease for 240 years, they might make a Lease for 2000 years. So if the Sons had acknowledged a Statute of such a sum as amounted to the value of the Land, it had been within the Condition. It was holden, That where the words are, *Circumibit vendere terram imperpetuum perdet*, this word *imperpetuum*, should be referred to *perdere*, and not to *vendere*.

Fenner, This Lease is not within the word (*Sell*;) For if the Custom be, That an Infant of the age of 15 years may sell his Land; yet by that he cannot devise it.

Note: That afterwards the words of the Condition set down in the Will in English, were read, viz. Shall go about to sell his part, shall for ever lose the same. And then it is clear, that this word *imperpetuum*, shall be referred in Construction to *perdere*, and not to *vendere*; for this word (*Shall*) is inserted betwixt both.

CCXXXIV. *Mich. 29 Eliz. In the Common Pleas.*

In a Formedon, The Tenant pleaded a Fine with proclamations: The Demandant replied, *Nul tiel Record*; And the truth of the Case was, That the Record of the Fine which remained with the Chirographer did warrant the Plea; but that which remained with the Custos Brevium did not warrant it; and both these Records were shewed to the Court.

And Rhodes, Justice, cited a President, 26 Eliz. Where, by the advice of all the Justices of England, where such Records differ; the Record remaining with the Custos Brevium was amended, and made according to the Record remaining with the Chirographer. Which Windham concessit.

And afterwards, the said President was shewed, in which was set down all the proceedings in the amending of it, and the names of all the Justices, by whose direction the Record was amended, were set down in it; And that the said President was written, and the amendment of the said Record recorded, by the Commandment and appointment of the said Justices in perpetuum rei memoriam.

And the reason which induced the said Justices to make such Order, is here written, because they took it, That the Note remaining with the Chirographer, est principale Recordum.

Mich. 29 Eliz. In the Kings Bench.

CCXXXV. Sir Gervase Clifton's Case.

4 Len. 199.

In a Quo Warranto against Sir Gervase Clifton, It was shewed, That the said Sir Gervase was seised of a Mannor, and of a House, in which he claimed to have a Court, with View of Frank-Pledge; and that he without any Grant or other authority usurpavit Libertates prædictas. The Defendant pleaded, Quod non usurpavit Libertates prædictas infra Messuagium prædict. modo & forma. And upon that, there was a Demurrer in Law; For the Defendant ought to have said, Non usurpavit Libertates prædictas, nec eorum aliquam; for he ought to answer, singulatim: And also he ought to have pleaded as well to the Mannor, as to the House; For if the Defendant hath holden Court within any place within the Mannor, it is sufficient. See 33 H. 8. Br. Franc. sans ceo, 364. An Information was in the Exchequer, That the Defendant had bought Wool of A.B. contra Statutum. The Defendant pleaded, That he had not bought of A. and B. The Plea was not allowed; but he shall plead, That he had not bought modo & forma: For if he hath bought of A.B. or J.S. the same is not material nor traversable. Which Case, Cook denyes to be Law. And he also conceived, That the Information upon the Quo Warranto, is not sufficient; For by the same, the Defendant is charged to hold a Court, and it is not shewed what Court; For it may be a Court of Pipeowders, Turn, &c. See 10 E. 4. 15 & 16. acc.

Shute, Justice, The Quo Warranto contains two things in it self; 1. A Claim. And, 2. An usurpation; and here, the Defendant hath answered but to the Usurpation, but saith nothing to the Claim. And it hath been holden in this Court heretofore, That he ought to answer to both.

And he said, That it hath been holden in a Reading upon the Statute of Quo Warranto, which is supposed to be the Reading of Justice Frowick, That a Quo Warranto doth not lie upon such Liberties which do not lie in Claim; as Felons goods, &c. which lieth only in point of Charter.

Mich.

Mich. 29 Eliz. In the Kings Bench.

CCXXXVI. Venable's Case.

The Case was; A Lease was made to A. and B. for their lives, the remainder to Tho. Venables in tail; who 3 Eliz. was attainted of Felony: 23 Eliz. there was a General Pardon. Tho. Venables, 24 Eliz. levied a fine, and suffered a Recovery to the use of Harris, Serjeant: Office is found, Harris traversed the Office; and thereupon was a Demurrer: It was argued by Leake, That Traverse did not lie in this Case; 4 H. 7. 7. Where the King is entituled by double matter of Record, the party shall not be admitted to his Traverse, nor to his Monstrans de Droit, but is put to his Petition. Which see, 3 E. 4. 23. in the Case of the Earl of Northumberland; Where Tenant of the King is Attainted of Treason, and the same is found by Office. See also 11 H. 4. in the Case of the Duke of Norfolk; And the same is not helped by the Statute of 2 E. 6. Cap. 8. for the words are, Untruly found by Office, but here the Office is true: By this Attainder, Tho. Venables is utterly disabled to do any Act; For by Bracton, a Person attainted forisfacit Patriam, Regnum, & Hereditatem suam, 13 E. 4. One was attainted of Felony: And before Office found, the King granted over his Lands. Also he is not helped by the General Pardon; For before the General Pardon, he had a special Pardon; therefore the General Pardon nihil operatur as to him: But by the Justices, the forfeiture both remain until the General Pardon.

1 Inst. 351. a.
Hughs Questions 13.

Harris, to the contrary. And he put the Case of Sir James Ormond, 4 H. 7. 7. Where the King is entituled by matter of Record, and the subject confesseth the title of the King, and avoids it by as high matter as that is for the King, Traverse in that case lieth: and if the King be entituled by double matter of Record, if the party avoids one of the said Records by another Record, he shall be admitted to his Traverse; And so here we have the Pardon which is a Record, and that shall avoid the Record for the King: And here the Pardon hath purged the forfeiture in respect of the Offence. And he said, That Tenant in tail being attainted of Felony, shall not lose his Lands, but the profits only, for he hath his Interest by the Will of the Donor, and it is a Confidence reposed in him; and as Walsingham's Case is he cannot grant over his Estate. And see, in Wroth's Case, Annuity granted pro Consilio impendendo, cannot be granted over, or forfeited, for there is a Confidence. See Empson's Case, Dyer, 2. and, 29 Aff. 60. If the Issue in tail be Outlawed of Felony in the life of his Father, and gets his Pardon in the life of his Father, after the death of his Father he may enter. But by Thorp, If the Issue in tail gets his Pardon after the death of his Father, then the King shall have the profits of the Lands during the life of the Issue. And the Case of

Cardinal Pool was debated in the Parliament, 27 Eliz. That he being Dean of Exeter, was seised of Lands in the right of his Church, and was attainted of Treason. It was holden, he should forfeit the profits of such Lands. But admit, That by this Attainder, the Land be forfeited; yet the party hath the freehold until Office found. See *Nickolls Case*, *Plow. Com.* And also the Case of the Dutchy, in *Plow. Com. acc.* And here, the Pardon hath dispensed with the forfeiture. A Tenant of the King aliens in Mortmain before Office found, the King pardons it, it is good. The Lord Poynings conveyed all his Lands to Sir Adrian Poynings who was an Alien, and after made a Denizen, and the King pardoned and released to him all his right in the said Lands without any words of grant; and adjudged, the same did bind the King: And he said, he had a good president, 14 H. 7. Where a General Pardon before seisure into the hands of the King, was allowed good; contrary, after a seisure without words of Grant. See Br. 29 H. 8. *Br. Charter of Pardon*, 52. If a Man be attainted of Felony, and the King pardons him all Felonies & executiones corundem, and Outlawries, &c. and releases all forfeitures of Lands and Tenements, and of Goods and Chattels, the same will not serve but for life of Lands, if no Office be found, but it will not serve for the goods without words of restitution and grant; for the King is entituled to them by the Outlawry without office: But the King is not entituled to Land, until Office be found. See *Ibid.* 33 H. 8. 71. The Heir intrudes, and before Office found, the King pardons, now the Heir is discharged as well of the Issues and profits, as of the Intrusion it self. But a Pardon given after the Office found, is available for the Offence, but not for the Issues and profits. And he cited the Case of Cole in Plowden, where a Pardon was granted, mean between the stroke and the death. See 35 H. 6. 1. 16 E. 4. 1. 8 Eliz. *Dyer*, 249. *Brereton's Case*. 11 Eliz. *Dyer*, 284, 285.

Egerton, Solicitor, contrary, This Traverse is not good, for he who traverseth, hath not made title to himself as he ought, upon which the Queen may take Issue; for it is in the Election of the Queen to maintain her own title, or to traverse the title of the party. At the Common Law, no Traverse lay but where Liberty might be sued; but that is helped by the Statute of 34 E. 3. but where the King is entituled by double matter of Record (as in our Case he is) no Traverse was allowed until 2 E. 6. Cap. 8. And in such Case, two things are requisite, 1. That the Office be truly found. 2. That the party who is to be admitted to his Traverse, have just title or Interest of Estate of Freehold, &c. But in our Case, the Office is confessed by the Traverse to be true, although that the conveyance be not truly found. And also Harris, at the time of the Office found, had not just title, but his Interest came to him, long time after the Office found. Also the traverse is not good, for he traverseth the matter of the Conveyance, which is not traversable; For if the Queen hath title, non refert, quo modo,

modo, or by what Conveyance he hath it. As to the matter in Law, Tenant in tail in remainder is Attainted of Felony, If the King during the life of the Tenant in tail, shall have the Freehold. And he conceived, he should; For it shall not be in abeyance; and it cannot be in any other; for when he is attainted, he is dead as unto the King: The chief Lord cannot have it; For the Tenant for life is alive; and also he in the remainder in Fee, &c. The Donor shall not have it; for the Tenant is not naturally dead, but civilly; and the Land cannot revert before the Tenant in tail be naturally dead without Issue. But if there were any other in whom the Freehold could vest, then the King should not have the Freehold, but only the profits. So if the Tenant be attainted, the Lord shall have the Land presently, 3 E. 3. 4 E. 3. The Husband seized in the right of his Wife, is attainted of Felony, the King shall have but the profits, because that the Freehold rests in the Wife; and if the Lord entreth, the Wife shall have an Assize. And Tenant in tail may forfeit for his life, as he may grant during his life. See Old N.B. 99. If Tenant in tail for Life, Dower, or by the Curtesie, be attaint of Felony, the King shall have the Land during their lives; and after their decease, he in the Reversion shall sue to the King by Petition, and shall have the Lands out of the Kings hands: And there it is further said, That the Lord by Escheat cannot have it; for the party attainted was not his very Tenant, but he in the Reversion; for the term yet endures: But now is to see, If the Freehold be in the King without Office; And I conceive that it is, Where the King is entituled to an Action, there the King ought to have an Office, and a Scire facias upon it: As where the King is entituled to a Cessavit, Action of Waste, &c. 14 H. 7. 12. Where entry in the Case of a Common person is necessary, there behoves to be an Office for the King. As where the Kings Willain purchaseth Lands, or an Alien born, &c. so is it, for a Condition broken, Mortmain, &c. In some Cases an Office is only necessary to instruct the King how he shall charge the Officer for the profits, which may be supplied as well by Survey as by Office: As if the King be to take by descent, or as the Case is here. And it is true, That a person attainted of Felony, may during his Attainder purchase Lands, and yet he cannot keep it against the King. And it is clear, That by the Common Law in such Cases, the Land was in the King, but not to grant. For the Statute of 18 H. 6. was an Impediment to that; But now that defect is supplied by the Statute of 33 H. 8. So as now the King may grant without Office. See 26 Eliz. Cook 3 Part, Dower's Case. And in our Case, Office is not necessary to entitle the King, but to explain his Title. See 9 H. 7. 2. The Lands of a Man attainted of High Treason, are in the King without Office; so where the Kings Tenant dieth without Heir; or Tenant in tail of the gift of the King dieth without Issue. See Br. Office before the Escheator, 34. See 13 H. 4. 278. A Man Attainted of Treason;

son, the King before Office, grants his Lands and Goods; Things which lie in Grant, as Advowsons, Rents, &c. such things upon Attainder are in the King without Office. As to the General Pardon of 23 Eliz. he conceived, That the same did not extend to this Case, and that this Interest of the Queen by this Attainder did not pass by the Pardon out of the Queen; So if the Queen had but a Right and title only.

Popham, Attorney General, By this Attainder, the Estate of him in the Remainder in tail accrued to the Queen for the life of him in the Remainder: For by our Law, Felony is punished by the death of the Offendor, and the loss of his Goods and Lands for the example of others, therefore nothing is left in him. Tenant for life is attainted of Felony, The King pardons to him his life, yet he shall have his Lands during his life; for he himself cannot dispose of them for his life: And so it is of Tenant in tail, &c. for he may forfeit all that which he hath, and that is an Estate for his life which is the Freehold. If Lands be given to one and his Heirs for the life of another, and the Donee be attainted of Felony, the King shall have the Land during the life of Cestuy que vie, for the Heir cannot have it, because the blood is corrupt, and there is not any Occupancy in the Case: For 17 E. 3. the Justices would not accept a Fine of Lands for the life of another, because an Occupant might be in the Case; But for a Fine of Lands to one and his Heirs for the life of another, they accepted a Fine, for there is no mischief of Occupancy. Land is given to A. for life, the remainder to B. for life, the remainder to the right Heirs of A. who is attainted of Felony: A. dieth; now the King hath a Fee executed: And here in our Case, If this Tenant for life had been dead, no Præcipe would lie against him in the remainder being in possession, but the party who had right was to sue to the King by Petition. 4 E. 3. If one seised in the right of his Wife of Lands for life, be attainted, the King shall have exitus & proficua: But I conceive that Case is not Law: For see F.N.B. 254. D. The Husband seised in the right of his Wife in Fee, is Outlawed of Felony; the King seisseth, the Husband dieth; Now shall issue forth a Diem Clausit extremum; the words of which Writ are in such case, Quia A. cujus terra & Tenement. quæ ipse tenuit de jure & hæreditate N. uxoris suæ, adhuc superstites occasione cujusdam utlagariæ in ipsum pro quadam feloniam inde indictatus fuit, &c. in manu Domini H. Patris nostri extiterunt, &c. therefore, the King hath not exitus tantum, but also the Land it self. See to the same purpose, the Register, 292. b. And see also now in the Book of Pleas of the Crown, 186, 187. which affirmeth, That Tenant in tail being attainted of Felony, shall forfeit the Land during his life. And he conceived, That this Estate of Tho. Venables was in the King without Office; not to grant, for he is restrained by the Statute of 18 H. 8. but it is in him before Office, that he who hath right ought to sue to the King by Petition, if he will have the same; Yet he conceived,

ved, That before the said Statute of 18 H. 6. the King might grant it before Office; as it appeareth by Thirning, 13 H. 4. 278. which was before the Statute. So if the Kings Tenant makes a Lease for years, the remainder over to another in Fee, who dyeth without Heir, the said remainder is in the King without Office, because a common person in such case cannot enter, but a Claim is sufficient; and therefore it shall be in the King without Office. As to the Pardon, he conceived, That it did not extend to this Estate; For the same is a Freehold, therefore not within the Pardon: As if the Kings Tenant be attainted of Felony, and the King pardons him all Offences, and all which he may pardon; these words will not go, or extend to Freehold, but only to personal matters, and such punishments and pains which do concern Chattels. But it may be Objected, That in this Pardon, title of Quare Impedit, and Re-entries for Conditions are excepted; and therefore if they had not been excepted, they had been released by the Pardon; And therefore this Pardon doth extend to Inheritances and Freeholds. As to that, I say, That such Exceptions were not in use in the time of King Ed. 4. and such Inheritances and Freeholds were not taken to be within such Pardons; And such Exceptions began; Eliz. And he said, he had been of Counsel in such Cases, where it had been taken, That such Pardons did not extend to Freeholds. As, an Abbot was disseised, and during the Disseisin, the Abby was dissolved; the King made such a Pardon, the same did not transfer the Kings right. And in this Case, there are divers Exceptions of Goods and Chattels in many cases, and therefore it cannot be intended that this Pardon doth extend to Freeholds. And see the said Act of Pardon; There, the Queen gave and granted all Goods, Chattels, Debts, Fines, Issues, Profits, Amercements, Forfeitures, and Sums of Money; which word (Forfeiture) shall be intended personal forfeiture, and not otherwise, for it is coupled with things of such nature. And as to the Traverse, he conceived, That it did not lie in this Case; For the Office is not untrue in substance, although it be void in Circumstances: And also the King here is entitled by double matter of Record; i. e. the Attainder and the Office. And he said, That the Statutes of 34 & 36 E. 3. which gave Traverse, are to be meant of Officers found virtute Officii, and not virtute Brevis; for then Escheatours were very troublesome. And 2 E. 6. doth not give traverse, but where the Office is untrue found. As if the Kings Tenant be disseised, and the Disseisor be Attainted; The Queen seisseth the Land; Now the Disseisor hath no remedy by traverse upon the Statute of 2 E. 6. but is put to his Monstrans de Droit, for that the Office is true: But if I be the Kings Tenant, and seised of Lands accordingly; and it is found that J. S. was seised of my Land, and attainted, &c. whereas in truth, he had not any thing in my Land, there Traverse lieth; For the Office is false; And so our Case for the Traverse, is at the Common Law. And it is true, that Venables was seised, &c.

Cook,

Hob. Rep.
342.

Cook, to the contrary; And he conceived, That by the Attainder, the Queen had gained but a Chattel; And that notwithstanding this Forfeiture, If Venables had been in possession, a Præcipe should be brought against him. And whereas it hath been said by Mr. Attorney, That the Writs set down in the Register, are the best Expositors of our Law; the same is not so: For the Register saith, That Waste lieth notwithstanding a mean Remainder, which is not now Law, but it hath been clearly ruled to the contrary. See acc. 50 E. 3. The Register therefore, and the Writs, are subject to the Judgments of our Law. And the Writ of *Diem clausit extremum*, is not to the contrary: For I confess, that in such case, the Land shall be seized into the Kings hands, but the King shall have but a Chattel in it. It hath been argued, He may grant, therefore he may forfeit. *Nego Consequentiam*; For a Man, seized in the right of his Wife, may grant, but not forfeit. Guardian in Socage may grant, but not forfeit; The Husband may grant a Term for years which he hath in the right of his Wife, but he cannot forfeit it. A Woman inheritor taketh Husband, and afterwards is attainted of Felony, the King pardons him, they have Issue; the Woman dieth, the Husband shall be Tenant by the Curtesie, which proveth, that the King hath no Freehold by this Attainder. Before the Statute of West. 2. Tenant in tail post prolem suscitatum might forfeit the Land, but now the Statute hath so incorporated the Estate tail to the Tenant in tail, that it cannot be divested: yea, a Fine levied ipso jure est nullus, although as to the possession it be a discontinuance: And that is the reason, wherefore Tenant in tail shall not be seized to another's use. See *Stamford*, 190. b. The Husband seized in the right of his Wife, is attainted of Felony, the King shall have the Issues of the Land of the Wife during the life of the Husband, &c. So if Tenant in tail be Attainted of Felony, that is but a Chattel in the Lands of the Wife, and also in the Lands of the Tenant in tail; and if the possessions of a Bishop be seized into the Kings hands for a Contempt, In such case the King hath possession, and not only the profits: The same Law of Lands of Tenant in tail or for life, being attainted of Felony. So seisure for alienation without Licence, or of the possessions of Poor Aliens. See *Br. Releisure*, 10. So where the seisure is for Idiocy. And he conceived, That nothing is in the King without Office. And as to the Case of 13 H. 4. 6. I confess it; For all that time many, and amongst them Lawyers and Justices, were attainted by Parliament; And so was Sir John Salisbury, whose Case it was, and their Lands by Act of Parliament given expressly to the King; and therefore I grant, that their Lands were in the King without Office. Tenant in Fee of a Common Lord is attainted of Felony, his Lands remain in him during his life, till the entry of the Lord; and where the King is Lord, until Office be found: but in the case of a Common person, after the death of the person attainted, it is in the Lord before entry;

Entry; and in the Case of the King, before Office, for the Dis-
chief of Abeyance. And see the Lord *Lovell's Case*, 18 Eliz.
Plow. Com. 485, 486. Where it is holden, That upon Attainder
of Treason by Act of Parliament, the Lands were not in the King
without Office in the life of the person attainted, upon the words
of the Act, shall forfeit. See *Stamford*, 54, 55. acc. 3. He con-
ceived, That this Interest which came to the King by this Attain-
der, was but a Chattel, and then it is released by the Pardon;
And so he conceived, If it be a Freehold. For the words of the Ge-
neral Pardon are large and liberal; Pardon and Release all manner
of Treasons, &c. And all other things, causes, &c. and here for-
feitures are pardoned; And also this word (Things) is a transcen-
dent, &c. And although it be a general word, yet by the direction of
the General Pardon it ought to be beneficially expounded and ex-
tended, as if all things had been especially set down. Also the
words are, Pardon them and their Heirs; therefore the same ex-
tends to Inheritances for any Offence not excepted, for there is
the word Heirs; And the third branch doth concern only Chattels,
and that is by the word Grant; where the former is, by the words,
Release and Acquit. See *Br. Charter of Pardon*, 71. 33 H. 8. Te-
nant of the King dieth seised, the Heir intrudes, Office is found;
in that case by Pardons of all Intrusions, the Offence is pardon-
ed, but not the Issues and Profits. But by the Pardon aforesaid,
all is pardoned. And here in our Case, the Office is void; for
the Statute makes all Precepts, Conditions, void, &c. being award-
ed upon such Forfeitures. See also in the second Branch, Vexed
and inquieted in Body, Good, Lands, &c. And see also amongst
the Exceptions, That persons standing endicted of wilful Murder,
and forfeiture of Goods, Lands, Tenements, grown by any Of-
fence committed by such person; By which he conceived, That
if that Exception had not been, the Land of such a person, if he
had been attainted upon such Indictment, should be forfeited. As
to the Traverse, he conceived, That in as much as the Office is
true, our plea is a *Monstrans de Droit*, although it concludes with
a Traverse. We vary from the Office in number of persons, and
in the day of the Feoffment; and every Circumstance in the Kings
Case is to be traversed, and our plea in substance doth confess and
avoid the Office.

Although the King here be entituled by double matter of
Record; i. e. the Attainder and the Office; yet one of the said
Records is discharged by another Record; i. e. the Pardon,
and then there is but one Record remaining; scil. the Office, and
therefore our Traverse doth lie. And he conceived, That at the
Common Law there was a Traverse; as where it was found by
Office, That the Lessee of the King had done Waste, or celled for
two years; and there it is said, That the Lessee and Tenant in
an Action brought against them, may traverse the Office, Therefore
traverse was at the Common Law, where the King was entituled
by

by single matter of Record. So upon an Office finding an Alienation without Licence, Traverse was by the Common Law. See Traverse in such Case, in the Case of William de Herlington, 43 Aff. 28. See *Br. Traverse*, 54. Petition is by the Common Law, and Traverse by the Statute; Frowick in his Reading. See *Stamf. Prerogat.* 60. That Traverse in the Case of Goods was at the Common Law, but Traverse for Lands found by Office, by 34 E. 3. Cap. 14. therefore the remedy was by Petition. See now, Cook 4. Part, the Sadler's Case, 55, 56. Traverse was at the Common Law concerning Freehold and Inheritance, but that was in special Cases, when by the Office the Land is not in the Kings hands, nor the King by that is in possession, but only by the Office, and entitled to the Action, and cannot make seisure without suit there: in a Scire facias brought by the King in the nature of such an Action to which he is entitled, the party may appear unto the Scire facias, and traverse the Office by the Common Law.

CCXXXVII. Mich. 27 Eliz. In the Kings Bench.

A Writ was awarded out of the Court of Admiralty, against Sir Tho. Bacon, and Sir Tho. Heydon, to shew cause wherefore, Whereas the Earl of Lincoln late High Admiral of England, had granted to them by Patent to be Vice Admirals in the Counties of Norfolk and Suffolk, the said Letters Patents ought not to be repealed and annulled. And so the said Writ was in the nature of a Scire facias.

It was moved by Cook, That although the Admiral had but an Estate for life; yet the Patent did continue in force after his death: As the Justices here of the Common Pleas, although they have their places but for life, may grant Offices which shall be in force after their death: And because the same matter is determinable at the Common Law, he prayed a Prohibition; For in the Admiralty they would judge according to the Civil Law: The Court gave day to the other side, to shew cause, why the Prohibition should not be awarded.

CCXXXVIII. Mich. 29 Eliz. In the Kings Bench.

1 Len. 302.
Ante 150.
Post. 230.

A Compt was brought by Harris against Baker, and damages were given by the Jury: It was moved to the Court, That damages ought not to be given by way of damages, but the damages of the Plaintiff shall be considered of by way of Arrearages. But see the Case, Hill. 29 Eliz. in C. B. betwixt Collet and Andrews. And yet, 10 H. 6. 18. in Accompt, the Plaintiff Counted to his damage, but did not recover damages, 2 H. 7. 13. 21 H. 6. 26. The Plaintiff shall not recover damages expressly, but the Court shall given Quoddam incrementum to the Arrearages.

Cook,

Cook said, That it had been adjudged, That the Plaintiff should recover Damages in an Accompt ratione Implicationis, & non Detentionis.

Mich. 29 Eliz. In the Kings Bench.

CCXXXIX. *Long's Case.*

NOte: It was holden in this Case, If a Feoffment in Fee be made of a Mannor, to which an Advowson is appendant; and Liberty is made in the Demesnes; but no Attornment; that in such case the Advowson shall pass, but none of the Services.

Mich. 29 Eliz. In the Common Pleas.

CCXL. *Barns Case.*

BArns brought an Action of Trespass, for taking of his sack of Corn; The Defendants justified in the behalf of the Town of Lawton in the County of Cornwall; because, That King Phil. and Queen Mary granted to them of the said Town, a Market to be holden within the said Town; and that the Plaintiff came to the said Town with a sack of Corn, and the Vendor would not pay Toll, for which cause, they took the said sack of Corn. And Judgment was given for the Defendant. Upon which, Error was brought, and assigned for Error, because that the Defendant pleads the Letters Patents with the date of the place, year, and day, without saying, *Magno sigillo Angliæ sigillat.* For it was holden, that (hic in Curia prolat.) is but form. And afterwards the Judgment was reversed, for default of the said matter, *Magno sigillo Angliæ (sigillat.)* And by Anderson, Justice, Patents are good without Inrollment; and that was adjudged in Hungate's Case.

CCXLI. *Mich. 29 Eliz. In the Exchequer Chamber.*

DEbt brought upon an Obligation; The Defendant pleaded *Post. 266.* payment apud Lockington, in the Parish of Killmerston: And the Venire facias was awarded de Lockington. And that was assigned for Error in the Exchequer Chamber, upon a Judgment given in the Kings Bench, That the Venire ought to be de Killmerston. See 6 H.7.3. 11 H.7.23,24. 9 E.4.3. Trespass for Entry in the Mannor of D. in S. the Visne shall come de Vicineto de S. and not from the Mannor. Contrary, if it be for the entry into the Mannor of D. only, for there it shall be de Vicineto Manerii.

Cook said, There was a Case very late adjudged in the Kings Bench; A Lease was pleaded to be made at Ramridge End in Lu-

ton; and that he himself was of Opinion, That the Venire ought to have been of Ramridge End, and not of Luton. But the Court Over-Ruled the same against him. It was said in the principal Case, That Lockington shall be intended a Town as this Case is; For a Parish may contain many Towns. And afterwards, the Judgment was affirmed.

CCXLII. Mich. 29 Eliz. In the Common Pleas.

1 Len. 313.

IN Trespass, for breaking his Close; The Defendant pleaded That heretofore he himself brought an Ejectione Firmæ against the now Plaintiff of the same Land in which the Trespass is supposed to be done, and had Judgment to recover, &c. and demanded Judgment, if against, &c. It was moved, That the Bar was not good, because that the Defendant had not averred his title, And the Recovery in one Action of Trespass, is no Bar in another, &c. Quod Curia concessit. But as to the matter, the Court was clear, That the Bar was good. And by Periam, Who ever pleaded it, it was well pleaded: For as by Recovery in an Assise, the Freehold is bound; so by Recovery in an Ejectione firmæ, the possession is bound. And by Anderson, A Recovery in one Ejectione Firmæ, is a Bar in another. Especially (as Periam said) if the party relyeth upon the Estoppel. And afterwards, Judgment was given, That the Plaintiff should be barred.

Mich. 29 Eliz. In the Common Pleas.

CCXLIII. Peter's Case.

William Peters, being Plaintiff in an Action of Debt in the Common Pleas, came to London this Term to prosecute his Action; And afterwards he was committed to the Marshalsey by the Lord Hunsdon, Chamberlain of the Queens household, and one of her Privy Council: And now an Habeas Corpus issued out to the Keeper of the Marshalsey, to have the body of the said Peters in Court: And at the day, the Keeper returned the said Writ, That the said Peters was committed to the said Prison, by the said Lord, and shewed the Warrant for it, there to remain and to Answer before the Lords of her Majesties Council to such matters, &c. Causa vero detentionis mihi omnino incognita est. The Court examined the said Peters upon his Oath, If he came to London to prosecute his said Cause? Who answered, That he did. And the Court also examined the said Keeper, If he had acquainted the said Lord with the said Writ? Who said, That he had so done; but he shewed him not any Cause. Wherefore by the Award of the Court, Peters was discharged of his Imprisonment.

CCXLIV. Hill. 29 Eliz. In the Common Pleas

Serjeant Fenner demanded the Opinion of the Court in this ^{1 Co. 153.} Case; A. Devised Lands to his Wife for life, and afterwards to B. his Son, and his Heirs, when he should come to the age of 24 years; and if his Wife died before his said Son should attain his said age of 24 years, that then J.S. should have the said Land until the said age of the said Son: A. died; J.S. died; the Wife died, the Son being within the age of 24 years: If the Executors of J.S. should have the Land after the death of J.S. until the said age of the Son, was the Question.

Anderson and Periam conceived, That he should not; For this Interest limited to J.S. by the Will, was but a possibility, which was never vested in him, and therefore could not by any means come to his Executor. Rhodes and Windham doubted of it.

Fenner put the Case, in 12 E. 2. Fitz. Condition, 9. Where Land is mortgaged to J.S. upon payment of Money to J.S. such a day, or his Heirs; and before the said day, J.S. by his Will deviseth, That if the Mortgagee pay the Money, that then A.B. should have them; That this Devise of this possibility is good; Quod omnes Iustiticiarii negaverunt.

And Windham put the Case between Weldon and Elkington, Plow.Com. 20 Eliz. 519. Where Lessee for years devised his Term to his Wife for so many years of the said Term as she should live; And if she died within the Term, that then his Son Francis should have the Residue of the Term not incurred: Francis died Intestate; the Wife died within the Term; The Administrator of Francis had the residue of the Term, and yet nothing was in Francis the Intestate, but a Possibility. A Lease was made to one Hayward, his Wife, and one of his Children; Habendum to Hayward for 99 years, if he should so long live: and if he die within the said Term, that then his said Wife should have the said Term for so many years which should be to come at the time of the death of her Husband; And if she died also before the said Term, That then the Child party to the Devise, should have it for so many years of the said Term as should not be expired at the time of the death of the Wife. And the Case of Cicill was vouched, 8 Eliz. Dyer, 253. A Lease was made to William Cicill, pro termino 41 annorum, si tam diu vixerit. Et si obierit infra prædictum terminum, extunc Uxor prædicti William Cicill habebit & tenebit omnia & singula præmissa pro residuo termini præd. incompleto, si tam diu vixerit. Et si the said Eliz. obierit, infra prædict. terminum, tunc William Cicill filius, &c. And it was holden by Catlyn and Dyer, That these remainders were void; For the Term is determinable upon

the death of William Cicill the Father, and the Residue of the said Term cannot remain.

And by Anderson, The remainders of the Term limited ut supra, are void; For every remainder ought to be certain, but here is no certainty; for it may be, that the first possessor of the Term may live longer, or die sooner, so as he in the remainder doth not know what thing he shall have.

And so also conceived Rhodes, Justice; And he put the Case between Gravenor and Parker, 3 & 4 Mar. Dyer, 150. A Lease was made to A. for life by Indenture; and by the said Indenture, a Proviso was, That if the Lessee died within the Term of 60 years then next ensuing, that then his Executors should have it in right of the Lessee for so many of the years as should amount to the number of 60 years, to be accounted from the date of the Indenture. And it was holden, That that secondary Interest to the Executor was void: And that the words concerning the same went only in Covenant.

Trin. 29 Eliz. In the Common Pleas.

CCXLV. The Lord Compton's Case.

2 Len. 211.
Kellow. 41.
4 Inst. 85.

Note: It was holden by the Lord Anderson, Chief Justice, in this Case, That if Cestuy que Use after the Statute of 1 R. 2. Leaseth for years, and afterwards the Feoffees Release to the Lessee and his Heirs, having notice of the Use; that that Release is to the first Use: But where the Feoffees are disseised, and they Release to the Disseisor, although that they have notice of the use, yet the same is to the use of the Disseisor: And no Subpoena lieth against the Disseisor. See 11 E. 4. 8.

Trin. 29 Eliz. In the Common Pleas.

CCXLVI. Sir Thomas Gorge and Dalton's Case.

Sir Thomas Gorge and the Lady Helene his Wife, brought a Square Impedit against Francis Dalton; Who pleaded, That the Queen was seised of the Mannor of D. to which the Advowson, &c. was appendant; and so seised, the Church became void: And that afterwards the Queen granted the said Mannor with the Advowson to J. S. who presented the Defendant. It was the clear Opinion of the Court, That by that Grant of the Queen the Advowson did not pass; although that the King by his Prerogative, may grant a thing in Action. Quod vide Dyer, 13 Eliz. 300. against F. N. B. 33 & 16 H 7.

CCXLVII.

CCXLVII. *Hill. 29 Eliz.* In the Common Pleas.

A Copeholder with the leave of the Lord Leased for years, and afterwards surrendered the Reversion with the Rent, to the use of a stranger; who was admitted accordingly. It was moved, If in this case there needed any Attornment, either to settle the Reversion, or to create a privity? 1 Len. 297.
Hob. Rep.
177.

It was holden in this Case by Rhodes and Periam, Justices, That the surrender and admittance, ut supra, are in the nature of an Inrollment, and so amount to an Attornment; or at the least, do supply the want of it.

Mich. 29 Eliz. In the Kings Bench.

CCXLVIII. *Carter and Marten's Case.*

Two Men made an Obligation jointly for Debt. The principal in the Obligation made him who was surety only for him in the said Obligation for payment of the Honey, his Executor, who payed the Honey generally; And, whether it shall be said, that he paid it as Executor, or as an Obligor, was a Quære, not resolved by the Court.

CCXLIX. *Mich. 29 Eliz.* In the Exchequer.

A Was indebted to B. who was indebted to the Queen; B. assigned his Debt unto the Queen: By all the Barons, Process shall be awarded out of the Exchequer, to enquire what Goods A. had at the time of the Assignment; and not what he had tempore Scripti prædict. facti, &c.

CCL. *Hill. 30 Eliz.* In the Exchequer.

A Was accountable to J.S. and afterwards J.S. was Outlawed in an Action personal: A. died; The Queen by her Letters Patents granted unto B. omnia bona & catalla, exitus, proficua, forisfactur. & advantagia quæcunq; which came to her, or accrued by reason of the Outlawry of the said J.S. And now B. brought an Action of Accompt against the Executors of the said A. as Executors of their own wrong. The Defendants pleaded, That they had Letters of Administration committed to them by the Ordinary, and demanded Judgment of the Writ. The Plaintiff in maintenance of his Writ, Replied, That the Defendants did Administer of their own wrong, before that Administration was granted unto them. Upon which the Defendants did demur in Law. It was the Opinion of some of the Justices, That the wrong is urged by taking of Letters of Administration; and now they

they are to be charged as Administrators only, and not otherwise. See 50 E. 3. 9. 20 H. 6. 1. And see the Case of the Cardinal of Canterbury, 9 E. 4. 33. If one Administ'reth of his own wrong, and afterwards takes Letters of Administration, he shall be sued not as Executor, but as Administrator. See 21 H. 6. 8.

But Gawdy, Justice, conceived, That the Defendants might be charged as Executors. As to the Grant of the Queen of this Action of Accompt. See *Br. Pat.* 98. 32 H. 8. that the King may grant a thing in action which is personal, as debt and damages, or the like; Or a thing mixt, as the Wardship of the body; but not a thing real, as an Action concerning Lands, Rights, Entries. But it was agreed on all sides, That if this Action had been granted specially, it had been clearly good. And it was Observed, That in the principal Case the Accomptant was dead before the Grant; so that his Executors were chargeable to the Queen, to render an Accompt, and the Queen was entituled to it. It hath been Objected, That this Action of Accompt came to the King by reason of his Prerogative Royal, and in vertue thereof the Executors are accountable to her, and therefore the Queen cannot grant the same over to a Subject: Certainly the same is not an Incident inseparable from the Crown, nor a flower of the Crown; as the King cannot grant over to a Subject power to pardon felons, for that is proper and peculiar to the person of the King; nor that a Subject may have a Court of Chancery: And although this matter of Accompt is at the first, i. e. at the time of the Grant, uncertain; yet by matter *ex post facto*, it may be reduced to certainty, i. e. by the Accompt; and although the Accompt be not expressly named in the Letters Patents, yet the words of the Grant, *ut supra*, do amount to as much. And Gawdy, Justice, conceived, That this Accompt ought to be brought in the name of the Queen: And all the Justices were of Opinion, That if the said A. had been living at the time of the said Grant of the Queen, the Grant had not been good; for then the Action against the Executors, which is the matter of Prerogative, had not been vested in the Queen.

Mich. 30 Eliz. In the Common Pleas.

CCLI. *Specot's Case.*

5 Co. 57.

Humphry Specot, and Elizabeth his Wife, brought a Quare Impedit against the Bishop of Excester, &c. of the Church of Tedcole in the County of Devon: The Bishop pleaded, That the Plaintiffs presented to him one John Holmes, quem super Examinationem invenit Scismaticum inveterat', and so non habilem to be instituted, vel ad acceptandum aliquod Beneficium cum Cara Animarum, for which he refused him, and of such Refusal gave notice to the Plaintiffs, and of the cause of it; upon which the Plaintiffs did

did demur in Law. It was argued by Fleetwood, Serjeant, for the Bishop, but to little purpose, therefore I will report but certain passages of his Argument: He conceived, That that general Pleading of Schismaticus inveteratus was good enough; as, if the Bishop certifieth Bastardy, It is sufficient to say, Bastardus, five Spurius, without other Circumstances, as to say, On the body of such a Woman begotten: Lollard derivatur à Lollia. i. e. Anglice, Tares. Sampson was Dean of Christ Church in Oxford, and was convented before the Ordinary for Schism, because he would not use a Surplice; and for that he was condemned for a Schismatick, and deprived of his Deanery, in the time of the Queen that now is. Shuttleworth, Serjeant, for the Plaintiffs, That the Bishop in his Plea ought to have shewed specially, how and in what point the Presentee of the Plaintiffs was Schismaticus: There are divers manners of Schisms. 1. In Doctrine. 2. In manners; and of each kind there are many, &c. And therefore, for doubt of enbeigling the Metropolitan, who is to try that Issue, the Defendant ought to have shewed the Schism in certain, in which the Metropolitan was to examine the Clerk readily. See 38 E. 3. 2. the Case of the Countess of Arundel, where in a Quare Impedit the Ordinary pleaded, That the Presentee was Criminosus & Perjurus, and shewed the Cause in what and when he was Perjured. And although this Issue is to be tryed by the Metropolitan, yet it ought to be formally pleaded in the Temporal Court, and with certainty: As where a Divorce is pleaded, It is not sufficient to say, That a Divorce was had; but the party ought to shew for what cause, and before what Judge the Divorce was had, which see 18 E. 4. 29. where the Divorce is specially pleaded for cause of Consanguinity; for by one Divorce the Issues are bastardized, by others not. See as to the Pleading of a Divorce 11 H. 7. 9. Profession, although it be a Spiritual thing, yet the general Pleading of it, is not good; but he who pleads it, ought to shew, of what Order, and under whose Obedience, 40 E. 3. 37. which see the Book of Entries 444. Intravit Religionem, viz. in Domino Carmelitarum de London, & ibi fuit professus sub Obedientia R. Prioris Domus illius. So Deprivation shall not be generally pleaded, which see Book of Entries 458. Ecclesia vacavit per Privationem, &c. per J. S. Legum Doctor. Delegat. &c. so of Resignation, 7 E. 4. 16. Resignavit in manus I. L. Bishop of London, Ordinary of the said place. Now, It is to see, If by this general Demurrer the matter in Fact be confessed, scil. That the Presentee was Schismaticus inveteratus; and as to that, the Rule is, That all matters in Fact, which are well and duly pleaded, by a general Demurrer be confessed; but that which is not well alleged, by no Demurrer shall be holden confessed: Which Learning see in the Commentaries, in Partridge and Stranges Case. And here for as much as Schismaticus is not well pleaded, for the cause aforesaid, it shall not be holden confessed. Now, It is to see,

If upon the Statute of 27 Eliz. this defect be helped; and he conceived it was not, for here the defect is in matter, and not in form: As if, in Trespass of his Close breaking, the Defendant justifies by a Lease for years, and doth not shew the place where the Lease was made, and the Plaintiff demurs generally upon it; the said defect is not helped by the said Statute, for that it is Matter. So in a Formedon in Descender, The Defendant pleads a Warranty with Assets, without shewing the place where the Assets is, and the Demandant demurs upon it generally, the same defect is not helped by the said Statute: See a good Case adjudged upon the Statute, Mich. 28 & 29 Eliz. between Henly and Broad. Periam and Windham, Justices, conceived, That the Plea of the Bishop is not good, because it is not shewed in what point the Presentee was Schismaticus; for by this general Pleading, if it should be allowed, the Metropolitan, to whom the Cryal of the Cause belongeth, shall be driven to peruse all Schisms, in the Examination of the Presentee, which is a thing infinite and inconvenient. Rhodes, and the Lord Anderson, to the Contrary: And Rhodes vouched an Old Book, 30 E. 1. out of a written Book of the Lord Catline. In a Quare non admisit, the Defendant pleaded, That the Clerk presented was Schismaticus & Adulter; and the Court commanded, that he hold himself to one of them, for which he said, Adulter; so as the Court did not mislike the Plea for the generality, but for the doubleness. And by Anderson, Our Case is not like the Cases put by Shuttleworth; for they concern things tryable by our Law, in which Case, to have convenient tryal, all matters issuable ought to be specially alledged; but here the Case is otherwise, and no peril of Cryal. And by the said Statute of 27 Eliz. we ought to judge according to the right of the Cause, and matter in Law. See this Case adjudged upon a Writ of Error brought in the Kings Bench. Hil. 32 Eliz. in Cook 5 Part, 57. Specot's Case.

Trin. 30 Eliz. In the Kings Bench.

CCLII. *Estrigge and Owles's Case.*

Ante 73.

IN an Action upon the Case by Estrigge against Owles, It was holden by the Justices, That forbearance per paululum tempus, is a good Consideration. Then it was moved, That in the Action, the Request was not sufficiently laid in respect of the place and time.

And Cook said, That the difference had always been agreed, That where the promise is to do a Collateral thing upon Request, there in the Declaration, the place and the time ought to be certainly set down; As it was holden in the Case of Alderman Pulifon;

Pulifon; where he promised to give a Tun of Wine upon request, in such case the request is traversable, and therefore it ought to be certainly shewed, for the request is parcel of the Issue: But if such Action be brought, and the Plaintiff declares upon an Indebitatus, then if the Plaintiff prove the Debt, it is not material to prove the promise; for every Contract executory implies a promise: and in such case, the request is not traversable. And the truth of the Case was, That one Tickil was indebted to the Plaintiff in 30*l.* and died Intestate; B. his Wife took Letters of Administration, and took to Husband the Defendant; And he, for the Consideration aforesaid, and that the Plaintiff would forbear his Debt for a little time, promised to pay it: And further declared, That he had forborn, &c. from such a day, until such a day; but yet the Defendant would not pay it, licet sepius requisitus: And upon this Declaration, the Plaintiff had Judgment: And now a Writ of Error was brought, and it was assigned for Error because that in the Declaration it is alledged, That the Wife Administered the Goods of the Intestate, and did not shew, that she was Administratrix, &c. and took Letters of Administration. 2. It is not alledged, That the Wife had Goods of the Testator at the time of the promise, for otherwise she shall not be bound. For it is but *Nudum pactum*; for Executors or Administrators, not having Assets, shall not be charged. And it was holden here, That Request is not necessary, for the debt was before the promise, so as the Request is not any cause of the Action.

Pasch. 30 Eliz. In the King Bench.

CCLIII. *Matthew's Case,*

NOte; That a Bill of Perjury, upon the Statute of 5 Eliz. was sued by the Queen and the party, because that the Defendant being one of the Homage, &c. did present with the rest of the Homagers, That the Plaintiff had cut down certain Trees, &c. Whereas in truth he had not cut down any. And it was holden by all the Justices, That for this matter, the Bill did not lie upon this Statute; For this branch of the Statute is to be intended of Perjury in Depositions only.

And by Tanfield, A Bill doth not lie upon the Statute upon Perjury committed in an Answer to a Bill in Chancery. See 41 Eliz. *Flower's Case.*

CCLIV. *Trin. 30 Eliz.* In the Common Pleas.Co. Rep.
Gatewards
Case.

IN a Replevin, The Defendant avowed for Damage Feasant; The Plaintiff in bar of the Avowry, shewed, That every Inhabitant in every Messuage in the said Town had used to have Common in the place where, &c.

Glanville argued, That the prescription was not good, for want of Capacity in the party who pretends Interest, for it is not certain, but applyed to a Multitude: and he put divers Cases in proof of it: 22 H. 6. 21 H. 7. 1. Mar. Dyer, 100. The King grants a Rent probis hominibus of Illington; the same is void, for they are not capable.

Harris, I conceive, That the Prescription is good; And he granted, That a confused Multitude cannot prescribe in a matter of Interest, but in an Easement, or discharge; As in a Way to the Church, and that by reason of Custom in the Land, and not in the persons. See 7 E. 4. 26. Where it is pleaded, That all the Inhabitants within such a Town time out of mind, &c. have used to have Common there, &c. And so a Township to have a Way to the Church; And good, by Danby. And, by Littleton, it ought to be pleaded by way of usage. And, 18 E. 4. 3. All the Inhabitants of such a Town, may well prescribe. And he cited Bracton, 222, 223. Communia quandoque; ex longo usu sive constitutione cum pacifica possessione continue & non intermixta, ex scientia, negligentia, & patientia Dominor', ita etiam amitti potest per negligentiam, & non usum. And he vouched Britton, fol. 144. Common is obtained by long sufferance; and also it may be lost by long negligence, &c.

Mich. 30 Eliz. In the Common Pleas.CCLV. *Pye and Grunway's Case.*

IN Trespafs brought by Pye against Grunway, and one B. The Plaintiff declared against Grunway only, who pleaded not guilty: And it was found for the Plaintiff. And in Arrest of Judgment, it was moved, That the Plaintiff in declaring against one only, had falsified his own Writ. So that it was said, That at the uttermost it is but a discontinuance, so but matter of form, and so relieved by the Statute of 18 Eliz. But it was said by the Court, that it may be, That B. was outlawed at the Plaintiffs suit, and then the proceedings is determined as against him. And the Court demanded of the Clerks, If the use of the Court be not so in such case to declare, That Grunway simul cum B. utlagat. ad sectam Querentis did the Trespafs? Who answered, Not in this Action: but in an Action of Debt, it is otherwise: And afterwards, notwithstanding that Exception, Judgment was given against the Plaintiff.

Hill.

Trin. 30 Eliz. In the Common Pleas.

CCLVI. Thorp and Wingfield's Case.

IN Waste, the Plaintiff declared upon a Lease for years generally; and the truth of the Case was, That the Plaintiff had made a Lease for years to one A. which Lease being in force for two years, he Leased the same Lands for years, as he hath declared, to begin presently; and the Waste which is assigned in the Declaration, was done during the first Lease: And now, If the Defendant upon this matter might plead, No waste done, was the Question. And it was said by the Court, That such a plea should be perilous for the Defendant, for it shall be found against him; and if he pleadeth the special matter aforesaid, scil. The former Lease in esse at the time of the Waste committed; after the expiration of which Lease, no Waste was done: If the second Lease be not by Indenture, it should be a good Plea; but if by Indenture, then the Plaintiff would estop him by the Indenture; to shew, that the second Lease hath another beginning than the Indenture purports, and then the Waste shall charge the Defendant; And although the Plaintiff had not declared upon a Lease by Indenture; yet if the Defendant pleaded the special matter aforesaid, he by way of Replication shall estop the Defendant to plead any other beginning of the Term than the Letter of the Indenture doth purport; and the same shall be no Departure, for it is matter which strengtheneth the Declaration.

Pascb. 30 Eliz. In the Common Pleas.

CCLVII. Botham and the Lady Gresham's Case.

IN a Prohibition by Botham and Couper, against the Lady Gresham who had impleaded them in the Spiritual Court for Tythe-Pay, and made their Suggestion; That time out of mind, &c. they had paid to the Vicar of the said Parish 4 d. for the Tythe of Hay of every Acre; It was moved, That upon that surmise a Prohibition ought not to be granted, for that a Modus Decimandi shall never come in Question: But the party ought to have pleaded the same matter in the Spiritual Court, scil. That the same doth appertain to the Vicar, and not to the Parson: and then if the Vicar sweth for the Tythe of the Hay, the Modus Decimandi will come in Question; and although that he hath averred in his surmise, that the Tythe-Pay belongeth to the Vicar, yet that is not material: And afterwards a Consultation was awarded.

1 Len. 94.
1 Cro. 71.
1 Len. 128.
Post. 265.

30 Eliz. In the Exchequer.

CCLVIII. *Rush and Heighgate's Case.*2 Len. 121.
Ca. 4. Rep.
Palmer's Case

PROCESS was awarded out of the Exchequer, against Rush, for the levying of the sum of 200 l. which he owed to the Queen; Upon which, It was found by Office, That Rush, 27 Junii, 22 Eliz. was possessed of Lands for the Term of divers years then and yet to come; And the Debt of the Queen began 12 Feb. 17 Eliz. And upon the Return of this Office, came one Heighgate, and shewed, That the said Rush, 16 Eliz. was possessed of the said Lease, and the same year assigned the same to the said Heighgate, and traversed the Office.

Exception was taken to the Inquisition, Because that the Lease is not certainly set forth; scil. the number of the years in certainty.

Cook, The Office is sufficient enough, notwithstanding this Exception, for the Queen is a stranger to the Lease, and therefore she shall not be driven to set forth the certainty. See 7 E. 6. *Plowden*, 85. *Partridge's Case*, upon the Statute of 32 H. 8. concerning pretended Titles, &c. there the Informer declared, That the Defendant had Leased Lands for years against the said Statute, &c. without shewing the number of the years; and the Information was holden good enough: for it is impossible, that a stranger have notice of every certainty, &c. and it is dangerous to meddle with such a particular certainty of the Lease, and to miss it: And in this Case, for as much as Heighgate comes to this Lease not by voluntary Contract, but by compulsory means; scil. by Execution upon the Statute, he cannot by common Intendment have notice of every particular Circumstance and Article of the Lease, as he may in case of a voluntary Contract. And also, although in pleading, the number of the years ought to be expressed, yet in an Inquisition such precise pleading is not requisite. See 15 H. 7. 7. An estate tail, and dying seised of it, was found by Office, without shewing of whose gift it was; and good enough.

CCLIX. *Trin. 30 Eliz. In the Exchequer.*

One exhibited a Bill in the Exchequer Chamber, upon the Statute of 2 E. 6. Cap. 13. to have the treble value, for not setting forth his Cythes according to the said Statute. But it was clearly holden by the Court, That the Bill did not lie upon that matter; for the Plaintiff hath his remedy for the same in the Court of Pleas in the Exchequer: And also for that there shall be no suit or proceedings according to the Order of the Exchequer Chamber in Cases of Conscience, upon any penal Statute.

Trin.

Trin. 30 Eliz. In the Exchequer.

CCLX. Body and Tassell's Case.

NOte: That in the Case between Body and Tassell, It was holden by Baron Clark, That if a Man lendeth Money, and for the forbearing of it, contracts for more than 10 l. in the 100 l. That the Bond made for it, is void presently; and that if he doth receive excessive Interest, that he shall forfeit treble the value.

Trin. 30 Eliz. In the Kings Bench.

CCLXI. Markham and Pitts's Case.

IN an Action upon the Case upon a Trover by Markham against Pitts, the Defendant after an Imparlance, pleaded an Outlawry of the Plaintiff: And it was holden by some, to be a good Bar, and therefore it may be pleaded after Imparlance; As 16 E. 4. 4. in Debt upon a Specialty: But not in Debt upon a Contract, Trespass, Battery, Imprisonment, &c. for such matters the King shall not have by Outlawry.

Trin. 30 Eliz. In the Kings Bench.

CCLXII. Crane and Juniper's Case.

THomas Crane brought an Action upon the Case against Juniper, and one John Matthew, upon an Assumpsit; and declared; That in Consideration that the Plaintiff took upon him, That whereas William Matthew was indebted unto him in divers sums of Money at the time of the death of the said William, that he would not molest the said Defendants being Executors of the said William Matthew before the 10th day of May next following, the Defendants promised to pay to the Plaintiff debitum predict. at the said 10th day of May; And declared further, Quod non molestavit: and yet, although scipius requisit. the Defendants had not paid him, &c. And upon Non Assumpsit pleaded, It was found for the Plaintiff. And it was Objected, That the Plaintiff had not maintained nor averred his Assumpsit; for the words of it are, Non molestavit nominatos Executores Testamenti & ultimæ Voluntatis William Matthew; but he ought to have averred more specially, quod non molestavit Juniper & Matthew, named Executors of William Matthew, nor any of them, by their names: Also he ought to have pleaded, Quod non molestavit, before the said 10th day of May, according to his promise. And also he ought to have shewed in his Declaration, how that he did not trouble them for the Debt of the Testator, &c.

Pasch.

Pasch. 30 Eliz. In the Kings Bench.

CCLXIII. *Walcot and Powell's Case.*

The Case was, That in an Action of Debt brought against the Husband and Wife, The Plaintiff declared upon an Obligation made by the Wife *dum sola fuit*; and the Writ was in the *Detinet tantum*: And upon Judgment given in that Action, a Writ of Error was brought in the Kings Bench; And that matter was assigned for Error; And by Cook, The Writ ought to be in the *Debet & Detinet*; for the Husband hath the Goods of the Wife in his own right; and so is the Register, 140.

Pasch. 30 Eliz. In the Kings Bench.

CCLXIV. *Wigmore and Wells's Case.*

Three were bound in a Bond by these words, *Obligamus nos & quemlibet nostrum Conjunctim*, And it was holden by the Court to be a joynt Bond, and not severall; for the word *Quemlibet* is expounded by the word *Conjunctim*.

CCLXV. *Pasch. 30 Eliz. In the Exchequer.*

It was holden by the Court in this Case, That if a stranger entreteth upon the Farm of the Queen, that by such Entry, he hath gained the Estate for years: and if he doth make a Lease unto another, his Lessee may maintain an *Ejectione Firmæ*.

Pasch. 30 Eliz. In the Kings Bench.

CCLXVI. *Abbot's Case.*

Alice Abbot brought an Action upon the Case upon 5 severall Assumpsits, and in the close of her Declaration, it was *Et prædict. J.S. licet sæpius requisitus, &c.* and so there was but one *licet sæpius requisitus* to all the 5 Assumpsits; whereas every severall Assumpsit ought to have his severall demand; for one general Request for all is not sufficient: For it hath been adjudged, Where one is indebted to me severally in severall sums of Money, made upon request, or demand made; And I go to him, and say to him, Pay me what you owe me; the same is not a sufficient demand or request. Wray, If one lendeth me Money, to repay it when he shall be required; *Licet sæpius requisitus* is not sufficient: but if the Plaintiff declareth upon a *Cum indebitatus fuisset*, the Defendant assumed to pay; there *Licet sæpius requisitus* is sufficient.

Pasch.

Pasch. 30 Eliz. In the Kings Bench.

CCLXVII. *Stackford's Case.*

SStackford, was indicted for disclosing the Counsel of the Queen, and of his Companions, being sworn upon the Grand Enquest for the County of Middlesex in this manner: It was intended by the Jury to indict the Brother of the said Stackford as a common Barrettor, and he disclosed the same to his Brother, and upon that matter he was indicted, and exception was taken to the Endictment, because it is not shewed in what thing he had disclosed their Counsel; 2. It is said, in Trinity Term, 29 Eliz. he disclosed; but it is not said what day of the month it was done; 3. The Endictment is that he being sworn coram Justiciariis Domine Regine, &c. and it is not shewed in what Court he was sworn, but generally at Westminster. The Justices were all of Opinion, that it was a lewd part, and that he should be fined for it; but he was discharged from the Endictment.

Pasch. 30 Eliz. In the Kings Bench.

CCLXVIII. *The Town of Green in Suffex's Case.*

The Town of Green in Suffex was amerced for the escape of a Felon, and that Amercement was grounded upon an Inquisition taken before the Coroner by whom the Escape was found; and it was moved for the Town, that there is not any such Escape found, for which the Town ought to be amerced: For it is found that he who escaped 10 Die Januarij. 30 Eliz. circa horam quartam post meridiem, with a Pitchfork mortally struck one A. which A. of the said stroak died 8 hours in the Evening of the same day, and that then the other escaped; For which Escape being done in the night, the Town by the Law ought not to be amerced, for it is not Felony until the party dieth. Which see 11 H. 4. and in Cole's Case 13 Eliz. Plow. Com. 401. And therefore the Town nor any other was charged with the offence before the party was dead. Wray, It should be a hard thing that the Town should be amerced upon this matter; for, although the Town in discretion might have slayed the party, yet it is not bounden to do it, &c.

Mick.

Mich. 30 Eliz. In the Common Pleas.

CCLXIX. *Bland and Riccard's Case.*

1 Cro. 225.

The Case was, that process of Attachment issued out of the Chancery against the Defendant, by force of which he was taken by the Plaintiff being Under-Sheriff; who took Bond of him, upon which Bond Debt was brought; the Bond being for his appearance at the day contained in the Attachment. It was the clear Opinion of the whole Court, That the Bond was void; for that the Defendant was not bailable upon the Attachment: See the Case of Dive and Manningham, 4 E. 6. Plowden, 61, 62.

Trin. 30 Eliz. In the Kings Bench.

CCLXX. *Fetherstone and Huttchinson's Case.*

In an Action upon the Case, the Plaintiff declared, That whereas one Hill had recovered in an Action of Debt against J.S. 10 l. upon which a Capias was awarded against J.S. that by force thereof he was Arrested, and being under Arrest, the Defendant in consideration that the Plaintiff would suffer the said J.S. to go at large circa negotia sua, and to go to his own House, and also in consideration of 2 d. paid to the Defendant, he promised to pay to the Plaintiff the said 10 l. It was holden by the Court, a void promise within the Statute of 23 H. 6. For, the consideration to let a Prisoner go at large is not lawful or good; and if part of the Consideration be not good, the whole is naught, and so it was adjudged.

Trin. 30 Eliz. In the Kings Bench.

CCLXXI. *Stretton and Brown's Case.*

In a false Imprisonment brought, the Defendant justified, because at the time he was Constable of D. and appointed the Plaintiff to watch, and he refused, by reason of which he set him in the Stocks; upon which the Plaintiff did demur in Law, because the Defendant had not alledged, that the Plaintiff was an Inhabitant within the Town; For the Constable cannot compel strangers which pass, to watch: And it was moved, If for such a Cause the Constable might set one in the Stocks; for it was said, he ought to complain of his refusal to a Justice of the Peace. Also the Constable cannot appoint any to watch at his pleasure, but only in his turn, for otherwise the Constable might upon a private revenge vex his Neighbors. See 22 E. 4. 35. Wray, Chief Justice, The Defendant ought to shew, That the Plaintiff was In-

Inhabitant in the Town, and that it was his Turn to Watch : and if such Inhabitant refuse to Watch in his Turn, the Constable may set him in the Stocks.

Trin. 30 Eliz. In the Exchequer.

CCLXXII. *Paramour and Tho. Robinson's Case.*

The Case was, George Robinson Lessee for yeats of the Mannor of Drayton-Basset, the Reversion to the King, devised his Term to his Wife, as long as she should keep her self a Widow, the remainder over, if she married ; and died, and made his Wife and William his Son his Executors, the said William being within age ; And therefore Administration was committed to the Wife alone, and she only proved the Will : And afterwards the Wife granted all her Interest to the said William, and died.

Cook, Nothing passeth by the Grant, for William had the Term before ; for every Executor hath an entire Interest.

Popham, Contrary ; for at the time of that Grant, the Son was within age, and had not administered, nor proved the Will ; therefore in effect the Wife was sole Executrix.

Egerton, Solicitor, If during the sole Executorship of the Wife, one committeth a Trespass upon the Land, the Wife alone shall have the Action of Trespass without naming her Co-executor : Which Cook denied. And he cited the Case, 16 H. 7. 4. If two Executors be, and one of them only is possessed of the Goods of the Testator, and a stranger takes them out of his possession, to whom the other Executor doth release ; and afterwards the Executor out of whose possession the Goods were taken, brings an Action of Trespass against the Trespassor, who pleads the Release of the other Executor ; It was holden a good Plea ; for the possession of the one, was the possession of the other. The Case was further, That Tho. Robinson the Defendant in pleading had shewed, That George Robinson was possessed, and devised the same to his Wife, who granted the same to William, who devised the same to the Defendant. On the other side, it was shewed, That Tho. Robinson the Defendant granted the said Term to Paramour the Plaintiff ; upon which they were at Issue. And the Question now was, If Tho. against his own pleading might give in Evidence, That Thomas did not grant ; for if the gift by the Wife to William was void, and he had the Term as Executor, Then he could not Devise it. And it was shewed also, That Thomas granted it by Indenture to Paramour : And now, If against that Indenture, he might give in Evidence such special matter, was the doubt. And, If the party shall be concluded if the Jury shall be concluded *ad dicendum veritatem*?

And by Popham and Egerton, As well the Jurors as the parties are concluded by the confession of the parties in the Record. For here, Thomas confesseth, That William devised to him ; *virtute cujus*, 2 Co. 4. he was possessed.

So that the Queens Attorney said, That it is true, that Thomas Robinson was possessed; but it is further said, That Thomas granted it to Paramour, and so the Interest of Thomas is confessed on both sides, and therefore the Jury shall not be received to say the contrary.

But the Opinion of Manwood, Chief Baron, was, That if the parties do admit a thing per nient dedire, the Jury is not bound by it; but where, upon the pleading a special matter is confessed, there the Jury shall be bound by it. And afterwards, the Issue was found against Robinson the Defendant.

CCLXXIII. Trin. 30 Eliz. In the Kings Bench.

IN an Action of Debt by A. against B. upon an Obligation, the Defendant pleaded tender of the Money according to the Condition; upon which the parties were at Issue. And after the Defendant pleaded, That after the Darrein Continuance, the Debt now in demand was Attached in the Defendants hands according to the Custom of London, for the debt of C. to whom the Plaintiff was indebted. It was the Opinion of the Court, That the Plea was insufficient, for it is altogether contrary to the first Plea. And also the Court held, That, in an Action for the debt depending here in this Court, the debt cannot be attached; and the Court would not suffer a Demurrer to be joyned upon it, but over-ruled the Case without any Argument; for it was said by Wray, Chief Justice, That it was against the Jurisdiction of the Court, and the Priviledge of it.

CCLXXIV. Trin. 30 Eliz. In the Kings Bench.

NOte: It was holden by the Court, That if a Coppelholder in Fee dieth seised, and the Lord admits a stranger to the Land who entreth, that he is but a Tenant at Will, and not a Disseisor to the Coppelholder who hath the Land by descent, because he cometh in by the assent of the Lord, &c.

CCLXXV. Trin. 30 Eliz. In the Kings Bench.

AN Ejectione firmæ was brought de uno Cubiculo; and Exception was taken to it: But the Exception was disallowed. The Declaration was special, viz. & Leas unius Cubiculi, per nomen unius Cubiculi, being in such a House, in the middle story of the said House. And the Declaration was holden good enough; and the word Cubiculum, is a more apt word, than the word Camera: And such was the Opinion of Wray, Chief Justice. And it was said, That Ejectione firmæ brought de una rooma, had been adjudged good in this Court.

Mich. 30 & 31 Eliz. In the Common Pleas.

CCLXXVI. *Johnson and Bellamy's Case. Rot. 824.*

IN an Ejectione firmæ, It was holden by Special Verdict, That W. Graunt was seised of certain Lands, and by his Will devised the same to Joan his Wife for life: And further he willed, That when Rich. his Brother should come to the age of 25 years, that he should have the Land to him and the Heirs of his body lawfully begotten: W. Graunt died, having Issue of his body who was his Heir. Rich. before he attained the age of 25 years, levied a Fine of the said Lands with proclamations in the life and during the lifetime of Joan to A. sic ut partes finis nihil habuerunt: And, If this Fine should bar the Estate in tail, was the Question: And the Justices cited the Case of the Lord Zouch, which was adjudged, *Mich. 29 Eliz.* Where the Case was, Tenant in tail discontinued to E. and afterwards levied a Fine to B. That although that partes finis nihil habuerunt, yet the said Fine did bind the Estate tail. But the Serjeants at the Bar argued, That there was a difference between the Case cited, and the Case at Bar: For in the Case cited, the Fine was pleaded in Bar; but here it was not pleaded, but found by Special Verdict. To which it was said by the Court, That the same is not any difference; For the Fine by the Statute is not any matter of Estoppel or Conclusion, but by the Statute binds and extinguis the entail, and the right of it. And Fines are as sufficient to bind the right of the entail when they are found by Special Verdict, as when they are pleaded in Bar.

And Periam, Justice, said, A Collateral Warrant found by Special Verdict, is of as great force, as pleaded in Bar. And afterwards Judgment was given, That the Estate tail by that Fine was utterly barred and extinct.

CCLXXVII. *Mich. 30 Eliz. In the Kings Bench.*

The Case was, A Man made a Lease for life, rendering Rent at Michaelmas; and further Leased the same to the Executors of the Lessee until Michaelmas, after the death of the Lessee. It was affirmed by Cook, That in that Case, it was adjudged, That the word (Until) shall be construed to extend to the Term unto the end of the Feast of St. Michael, and so the Rent then due payable by the Executors; for without such Construction, no Rent should be then due, because the Term ended before Michaelmas.

CCLXXVIII. Pasch. 30 Eliz. In the Kings Bench.

One was bounden to stand to the Award of two Arbitrators, who awarded, That the party should pay to a stranger or his Assigns 200 l. before such a day: The stranger before the day died; B. took Letters of Administration. The Question was, If the Obligee should pay the Money to the Administrator, or if the Obligation was discharged. It was the Opinion of the whole Court, That the Money should be paid to the Administrator, for he is an Assignee. And by Gawdy, If the word (Assigns) had been left out, yet the payment ought to be made to the Administrator; Which Cook granted.

CCLXXIX. Pasch. 30 Eliz. In the Common Pleas.

The Defendant in Debt, being ready at the Bar to wage his Law, was examined by the Court, upon the points of the Declaration, and the cause of the Debt; upon which it appeared, that the Plaintiff and Defendant were reciprocally indebted the one to the other: And accounting together, they were agreed, That each of them should be quit of the other. It was the Opinion of Periam and Anderson, Justices, That upon that matter, the Defendant could not safely wage his Law; For it is but an agreement, which cannot be executed, but by Release or Acquittance.

CCLXXX. Pasch. 30 Eliz. In the Common Pleas.

Tenant in tail Covenanted with his Son to stand seised to the use of himself for life, and afterwards to the use of his Son in tail, the remainder to the right Heirs of the Father: The Father levied a Fine with proclamations, and died. It was moved by Fenner, If any Estate passed to the Son by that Covenant? for it is not any discontinuance, and so nothing passed but during his life; and all the Estates which are to begin after his death, are void.

Anderson, Justice, The Estate passeth until, &c. And he cited the Case of one Pitts, where it was adjudged, That if Tenant in tail of an Abbotsdon in gross, grants the same in fee, and a Collateral Ancestor releaseth with warranty, and dieth, that the same is a good bar for ever.

Pasch. 30 Eliz. In the Common Pleas.

CCLXXXI. *Ognell's Case.*

In a Replevin against Ognell, who abowed for Rent; the Plaintiff was Nonsuit; the Question was, Whether the Court might assess Damages, without a Writ of Enquiry of Damages? It was the Opinion, That they might; for they are not in respect of any local matter, but they accrue to the Abowant, for the delay in the non-payment of the Rent: Contrary, where Judgment is given for the Plaintiff, there, the Court shall not assess the Damages, for he ought to recover for the taking of his Cattel, of which the Judges cannot take notice; and the Damages may be greater or less according to the value of the Cattel, and the Circumstances of the taking and delaying of them.

Clayton
Rep. 91.

Mich. 30 & 31 Eliz. In the Kings Bench.

CCLXXXII. *Hitchcock and Harvey's Case.*

Hitchcock brought an Action of Trespass for breaking of his Close, and spoiling of his Grass, against Harvey: and the Case was, That A. was seised of the Land in which, &c. and granted to the Plaintiff proficuum of such a Mead called Tentry Mead, post falcationem inde; scil. the Car-grass. And it was found by Verdict, That Car-grass is such Grass, which is upon the Land after the mowing, until the Feast of the Annunciation after. It was moved, If such a Grantee might have Trespass, Quare Clausum fregit? And it was the Opinion of the Court, That he could not; but for spoiling the Grass he might

1 Cro. 431.

Clench, Justice, If a Man be Outlawed in an Action personal, The Queen hath the profits of the Land, and lets the same to another, He shall have an Action of Trespass, Quare Clausum fregit; Which Shute granted: And afterwards because the Jury had given Damages entire, as well for the breaking of the Close, as for the spoiling of the Grass, the Plaintiff could not recover the Damages.

Hill. 30 Eliz. In the Kings Bench.

CCLXXXIII. Chard and Tuck's Case.

1 Cro. 41.
1 Cro. 15, 16
114, 170.
130.
Shep. Touch.
94.
Bro. Tit.
Judgment
83.

IN an Ejectione firmæ by Chard against Tuck, It was found by special Verdict, That A. was seised of a Messuage, and of a Curtilage, and of a Garden to the same belonging in Fee; and that the Curtilage was on the back side of the said House, and the Garden next beyond the said Curtilage, the Garden being divided from the Curtilage by a Wall, and a Door through the Wall into the Garden from the said Curtilage, and no Way to either of them, but through the House. And it was further found, That the said A. by his Will devised the said Messuage to B. The Question was, If by that Devise, the Curtilage and Garden did pass. Vide inde Br. 23 H. 8. *Fcoffments*, 53. Where a Feoffment is made of such a Messuage cum pertinentiis, they shall pass. Curtilage, is a member, at the least an Appendix of a Messuage. And by the clear Opinion of the whole Court in the Case at Bar, It was Resolved, That by this Devise, the Curtilage and Garden did pass.

And it was said by Wray, Chief Justice, It matters not, Whether the Curtilage and Garden be before the House, or behind it; for in both Cases they shall pass.

Mich. 30 Eliz. In the Exchequer.

CCLXXXIV. Baxter's Case.

4 Inst. 229.

AN Information in the Exchequer, was exhibited against Baxter of Cambridge, upon the Statute of 7 E. 6. Cap. 5. of Wines, and the selling of them against the purview of the said Statute. To which the Defendant pleaded, That King Rich. the second in the 5th year of his Reign, Granted unto the Chancelloz and his Deputy, and the Scholers of the University of Cambridge, Custodiam assise panis, vini, & Cervisie, & correctionem & punitionem eorundem; And that the Queen that now is, confirmed the said Grant in the third year of her Reign by her Letters Patents; which were after confirmed by Act of Parliament, 13 Eliz. And so pleaded to the Jurisdiction of the Court. Upon which, It was demurred in Law.

Harris argued for the Queen; and said, That the Defendant could not plead that matter to the Jurisdiction of the Court at that time, for it is now too late, for that he hath oftentimes imparled, and that generally: In which case, the Court having general and ordinary Jurisdiction and Authority to hold plea of such matters, shall have Conusans of them, notwithstanding the matter which hath been shewed, and set forth. On the other side, It hath been

been said, *Quod Assisa venit de assidendo*; that is, to have the Assise, as well in respect of the price, as of the measure: Which although it be admitted, yet the same shall not help them; For they of Cambridge have not *Assisam ipsam*; but only, *Custodiam assise*, i.e. that the Assise, set down by the Queen and her Council, be well kept; And that no other price, or measure be used in the uttering of Wines.

Popham, The Queens Attoyny, to the same intent. The Statute of 31 H. 1. Ordains, That when Wheat is at such a price in the Market, then every penny Loaf is to weigh so much; and so when Barley is at such a price, then so much Beer shall be sold for a penny: And that was the general Assize limited by the said Statute: In these Cases, the University cannot appoint another Assize, than that which is set down by the said Statute; but to take care, that the said Statute be well executed in such Assise. See the Statute of 31 E. 1. of Wines, scil. That Wines shall be sold according to the Assize of the King; i.e. 12 d. the Gallon: And in that matter, the University hath *Custodiam* only; i.e. the survey of the Assize, and the execution of it, and authority to punish the Offences against the said Statutes, as well in the price, as in the measure according to the said Statutes, and not otherwise, &c. And as to the Statute of 7 E. 6. Cap. 5. By which it is provided, That the said Statute shall not be prejudicial to any of the Inhabitants of Oxford, or Cambridge, or unto the Chancellor, or Scholars there to impair their Liberties, &c. The same ought to be intended, that the Liberties and Franchises which the Universities had before by the Grant, ut supra, &c. i.e. to punish such Offences against the Assise, according to the old Statutes. For the said Statute of 7 E. 6. Cap. 5. being in the Affirmative, doth not take away the punishment appointed by any other Statute; but doth continue the same. And a further penalty is appointed, *propter ulteriorem poenam*.

And as to that which hath been said, That by the said Grant of Rich. the 2d, they have granted to them *Cognitionem omnium Actionum personalium inter partem & partem*, That will not help the University in this Case: For the Informer by the Statute, hath Liberty to sue in what Court he will in any of the Kings Courts of Record. And in this Case, the Queen is *quodam modo* a party; For she is to have the moiety; And so this cause is not merely betwixt party and party, &c.

*Trin. 30 Eliz. In the Kings Bench.*CCLXXXV. *Willoughby's Case.*

2 Len. 117.

William Willoughby, and two other were Endicted, That where the Parson of the Church of D. and all his predecessors have used to have Common in such a place; The said Defendants, Willoughby and others, had enclosed the same, and that enclosure was upon their own Land.

It was moved, That upon this matter they ought not to have been endicted; but the party grieved was put to his Action; As, where a presentment is made of a Disseisin. See 27 Ass. 20. And it was the Case of one Marden, 29 Eliz. upon the stopping of a High-Way upon his own Land; and if it were upon other Land, it were not material; for it is but an Impeachment to take Common, which cannot be Vi et armis, &c. Also this Endicement is Recorded and Certified as found before Justices of Assize and Gaol-Delivery, and they cannot take such presentment. And although the Justices of Assize and Gaol-Delivery were in rei veritate also Justices of Peace; yet the Endicement being recorded and certified to be taken before them in quality of Justices of Peace, shall not help it; for the Court shall not respect any Authority but that which appears upon the Record. And for these Causes, the parties were discharged.

*Pasch. 30 Eliz. In the Kings Bench.*CCLXXXVI. *Gates and Hollywell's Case.*

A Man having Issue two Sons, devised, That his eldest Son with his Executors should take the profits of the Lands, until his younger Son should come to the age of 22 years; and then the younger Son should have the Lands to him and his Heirs of his body: It was the clear Opinion of all the Justices, That the eldest Son should have a Fee-simple in the Lands, until the younger Son came to the said age of 22 years.

*Mich. 30 Eliz. In the Common Pleas.*CCLXXXVII. *Cony and Beveridge's Case.*

2 Len. 146.

In Debt upon an Obligation, the Case was, That the Plaintiff Leased to the Defendant certain Lands in the County of Cambridge, rendring rent; And afterwards, the Defendant became bounden to the Plaintiff in an Obligation for the payment of the said Rent: upon which Bond, the Plaintiff brought an Action of Debt in the County of Northampton. To which the Defendant pleaded

pleaded payment of the Rent, without shewing the place of payment, and upon that they were at Issue. And it was found by Nisi prius, in the County of Northampton for the Plaintiff; It was moved in Arrest of Judgment, That the Issue is mis-tryed; for here the payment of the Rent being pleaded, without shewing the place of payment, it shall be intended, that the Rent was paid upon the Land, which is in the County of Cambridge, and there the Issue ought to be tryed. See 44 E. 3. 42.

And it was the Opinion of Anderson Chief Justice, That no Judgment should be given for the Plaintiff, for the Cause aforesaid.

But Rhodes and Windam Justices, were of a contrary Opinion; for it doth not appear, That the Issue is mis-tryed, because that no place of payment is pleaded, and it may be, for any thing that is shewed, That the Rent was not paid in the County of Northampton.

Mich. 30 Eliz. In the Common Pleas.

CCLXXXVIII. The Blacksmith's Case.

A Blacksmith of South Mimmes, in the County of Middlesex, took an Obligation of another Blacksmith of the same Town, upon Condition that he should not exercise the Trade or Art of a Blacksmith within the same Town, nor within a certain precinct of the same. And upon that Obligation, the Obligee brought an Action of Debt in the Common Pleas; depending which Suit, the Obligor complained to the Justices of Peace of the County against the Obligee, upon which the matter being found against him by Examination, the Justices committed the Obligee to Prison; and now, upon the whole matter, Puckering Serjeant moved a Habeas Corpus for the said Obligee to the Sheriff of Middlesex, and had it. And Fleetwood Recorder of London being at the Bar, the Court openly admonished him of that matter; for by the Law, Justices of Peace have not Consuls of such Offences, nor can intermeddle with them; for their power is limited by the Commission, and the Statutes. And the Recorder replied much upon the Opinion of Hull. in 2 H. 5. 5. But it was said by the Court, Although that this Court be a high Court to punish such Offences appearing before them of Record; yet it doth not follow, That the Justices of Peace may also do so: But as to the Obligation it self, the Court was clear of Opinion, That the same was void, and against the Law.

Mich. 30 Eliz. In the Common Pleas.

CCLXXXIX. Russell and Broker's Case.

2 Len. 209.

IN Trespass, for cutting down of 4 Oaks; The Defendant pleaded, That the place where, &c. And that he is seised of a Messuage in D. and that he, and all those whose Estate he hath, &c. habere Consueverant rationabile estoverium suum for fuel, ad Libitum suum Capiendum in boscis, subboscis & arboribus ibidem crescentibus, and that in Quolibet tempore anni, unless in Fawning time. The Plaintiff by Replication said, That the place where is in the Forrest of D. &c. And that the Defendant, and all those whose Estate, &c. habere Consueverunt rationabile estoverium suum de Boscis, &c. per Liberationem Forestarii, aut ejus Deputati, prout Boscus pati potuit, & non ad exigentiam petentis, And upon that Replication, the Defendant demurred in Law. And it was the clear Opinion of the Court, That Judgment should be given against the Plaintiff: For if he would have ousted the Defendant of his Prescription by the Law of the Forrest, he ought to have shewed the Law of the Forrest in such Case: Lex forestæ talis est; For the Law of the Forrest, is not the Common Law of the Land; and we are not bounden to take notice of it, but it ought to be pleaded; Or else the Plaintiff ought to have traversed the Prescription of the Defendant; For here are two Prescriptions, one pleaded by the Defendant by way of Bar; The other set forth by the Plaintiff in his Replication, without any traverse of that which is set forth in the Bar, which cannot be good. But if the Plaintiff had shewed in his Replication, Lex forestæ talis est, then the Prescription of the Defendant had been answered without any more; for none can prescribe against a Statute.

Exception was taken to the Bar, because the Defendant hath justified the cutting down of Oaks, without alledging, That there was not any Underwoods: But that Exception was not allowed, for he hath his Choice, ad libitum suum.

Poph. 158.

2 Cro. 637,

679.

Another Exception was taken to the Bar, because he hath not shewed, that at that time of the cutting, it was not Fawning time; for at the Fawning time his prescription doth not extend to it, and that was holden to be a material Exception: but because that the Plaintiff had replied, and upon his Replication, the Defendant had demurred; the Court would not resort to the Bar, but gave Judgment upon the Replication, and therefore Nihil Capiat per breve.

Mich.

Mich. 30 Eliz. In the Kings Bench.

CCXC. *Brocas's Case.*

BROCAS, Lord of a Mannor, Covenanted with his Coppholder, to assure to him and his heirs, the Freehold and Inheritance of his Copphold; And the said Coppholder in Consideration of the same performed, Covenanted to pay such a sum: It was the Opinion of the whole Court, That the said Coppholder is not tyed to pay the said sum, before the assurance made, and the Covenant performed: But if the words had been, In Consideration of the said Covenant to be performed, then he is bounden to pay the money presently; and to have his remedy over by Covenant. 1 Roll. 415.

Trin. 30 Eliz. In the Kings Bench.

CCXCI. *Ireland and Higgins's Case.*

IN an Action upon the Case, the Plaintiff declared, That he was possessed of a Greyhound ut de bonis suis propriis; and that such a day he lost it, and that it came to the hands of the Defendant by Trover; and that the Defendant afterwards in Consideration thereof, promised the Plaintiff to deliver the said Greyhound to the Plaintiff: and shewed his request. Owen Rep. 93.

Ley, The Action doth not lie; For of those things which are *fera natura*, the Plaintiff hath not any property, but *ratione fundi*, as of Deer, &c. And in *Trepanis* for them, he cannot say (*suos*), but only *Quare clausum fregit*, & *lepores cepit*, without saying (*suos*). And to that purpose were cited, 3 H. 6. 56. 18 E. 4. 14. 10 H. 7. 19. 22 H. 6. 12. 14 Eliz. Dyer, 106. Sir John Spencer's Case. And it was holden, That the Action did not lie; And it not for a hawk, much less for a pound.

Mich. 30 Eliz. In the Star-Chamber.

CCXCII. *Ognell and Trussell's Case.*

A Bill was Exhibited in the Star-Chamber, by Ognell of London, against one Trussell of Warwickshire; setting forth such matter, That whereas the said Trussell had for good Consideration sold and assured unto the said Ognell a Mannor: Now, to gratifie a great person who earnestly desired the said Mannor, he for effecting thereof, practised by fraudulent means to avoid the said assurance; and practised by other persons to be Indicted of a Robbery

Robbery supposed to be committed before the said Assurance; and compounded with the Lord of the Fee, that if he be attainted, so that by such Attainder, the said Hannon should escheat to the said Lord, That he upon request should reassure to the said Trussell the said Hannon in Fee after Pardon obtained, which was promised to him by the said great Parsonage: Upon which Indictment, Trussell was Arraigned, and Comitted upon Conscience; which he himself procured to be falsly given against him; And all that was, to extort the Land which was lawfully sold before. And upon the Bill, Trussell demurred in Law, because he is a person attainted of Felony, and so dead in Law, and therefore shall not be put to answer.

Hutton, Lord Chancellor, It is not reason that he be put to Answer, for Nemo tenetur seipsum prodere: And thereupon the Bill was referred to Anderson and Periam, Justices, to Consider, If the Defendant should be put to answer, or not? Who certified unto the Court, That although the Defendant be attainted, ut supra, and so, quodam modo, dead in Law to all intents; yet in Criminal Causes, he shall answer, Wherefore it was ordered, That he answer accordingly.

Mich. 30 Eliz. In the Common Pleas.

CCXCIII. Cardinal and Arnold's Case.

Cardinal brought an Action upon the Case against Arnold, and declared, That the Dean and Chapter Ecclesie Cathedralis Cantuar. per nomen Decani & Capituli Ecclesie Cathedral. & Metropolitan. Christian. Cantuar. Leased unto Seckford for years the Hannon of Hadley, by force of which he was possessed; And so possessed, granted to the Plaintiff the Office of Stewardship of the said Hannon, and the Defendant disturbed him. The Defendant pleaded a Lease, absq; hoc, that the said Seckford granted. And it was found for the Plaintiff.

And it was moved in Arrest of Judgment, That that Lease being made in the manner aforesaid, was void: For, the Declaration is, That the Dean and Chapter Ecclesie Cathedralis Cantuar. where the Lease is made by the name, ut supra. Here are two several Names; therefore two several Corporations, therefore Decanus & Capituli Ecclesie Cathedralis Cantuariensis did not Lease; But Decanus & Capituli Ecclesie Cathedralis & Metropolitan: Christi, did Lease.

Pasch.

Pasch. 30 Eliz. In the Kings Bench.

CCXCIV. *Anderson and Hayward's Case.*

A Coppholder of Inheritance of a Mannor in the hands of the King, is ousted. It was holden in such case, That he hath not gained any Estate, so as he may make a Lease for years, upon which his Lessee may maintain an Ejectione firmæ; but he hath but a possession against all strangers. And also in that Case, It was holden, That if a Coppholder dieth, his Heir within age, he is not bound to come at any Court during his Non-age, to pray Admittance; Or to tender his Fine. Also, that if the death of his Ancestor be not presented, nor proclamation made, he is not at any Dischief, although he be of full age.

Pasch. 30 Eliz. In the Exchequer Chamber.

CCXCV. *Brightman's Case.*

Upon a Writ of Error brought upon a Judgment given in the King Bench; The matter was, A. Leased for 20 years to B. two Acres of Land, rendring Rent, with Condition of Re-entry, who Leased one of the said Acres to C. for 10 years. And afterwards, granted the Reversion of the said Term in the said Acre to A. It was holden by the Justices, That the same was no present suspension of the said Condition, because there was not any possession.

Hill. 30 Eliz. In the Common Pleas:

CCXCVI. *Fitzhugh's Case.*

In Dower against Fitzhugh who pleaded in bar a Fine with proclamations, and 5 years passed after the death of the Husband; of whose seisin she demanded Dower. To which the Demandant said, That within the 5 years after the death of her Husband, she brought a Writ of Dower against the now Tenant, and delivered the same to the Sheriff, &c. but did not shew that the Writ was Returned; upon which, the Tenant did demur in Law.

It was holden by Periam, Justice, That the Fine is not avoided by such manner of Claim; For the words of the Statute are, (So that they pursue their Claim or Title by way of Action, or lawful Entry within the 5 years,) but here the Demandant hath not pursued, &c. therefore she shall not be Retained by the said Statute.

Mitch.

*Mich. 30 Eliz. In the Common Pleas.*CCXCVII. *Mounson and West's Case*

1 Len. 88.

IN the Case of Mounson and West; which see, in Leon. 1 Part, 88. Where the Case was in Trespass, the parties were at Issue; and at the Return of the Pannel, the Defendant challenged the Array, because it was made by B.A. who took to Wife the Cosen German of the Plaintiff, et ex ea had Issue living, the Mother being dead: Upon which it was demurred in Law. Now this Term came the Plaintiff, and offered to relinquish his Demurrer, and confess the Cosenage, and prayed a Writ to the Coroners. It was the Opinion of the Court, That he might so well do by the Law, because the Demurrer is not made up: Which matter the Prothonotaries excused, because the Demurrer was not subscribed with a Serjeants hand.

To which it was said by the Court, That a Demurrer upon a Challenge, is not like to a Demurrer upon a Plea; For in case of a Demurrer upon a Challenge, as soon as the Demurrer is agreed upon at the Bar, it is good enough without other Circumstance, and the Prothonotaries of right ought to enter such Demurrer.

*Trin. 30 Eliz. In the Kings Bench.*CCXCVIII. *Fetherstone and Hutchins's Case.*

IN an Action upon the Case upon Assumpsit, the Plaintiff declared, That whereas one Hill had recovered in an Action of Debt against J.S. 10 l. upon which a Capias was awarded against the said J.S. by force of which the Plaintiff Arrested him: and so being under his Arrest, the Defendant in Consideration that the Plaintiff would suffer the said J.S. to go at large, circa negotia sua, and to go to his own House: And also in Consideration of 2d. paid to the Defendant, he promised to pay to the Plaintiff the said 10 l.

It was holden by the Court, That the same was a void promise within the Statute of 23 H. 6. for the Consideration to let the Prisoner go at large, is not lawful; and if part of the Consideration is naught, so is the whole: And Adjudged accordingly.

Hill.

Hill. 30 Eliz. In the Common Pleas.

CCXCIX. Gore and Wingfield's Case.

IN Debt upon an Obligation; The Obligation was written in this form; Know all by these presents, That I H. Wingfield, am bound to William Gore, &c. in the sum of, &c. For the payment of which sum, I give full power and authority to the said Gore, to levy the said sum upon the profits of the Bailiwick of Swinfield from year to year, until the same be paid. To which the Defendant pleaded, That the Plaintiff had levied parcel of the said sum, &c. and did not shew how; And therefore the pleading was found vitious: And it was clearly agreed by the whole Court in this Case, That the Plaintiff at his Liberty might bring his Action upon the said Obligation; or levy the said money according to the Clause aforesaid. 4 Len. 208

Hill. 30 Eliz. In the Common Pleas.

CCC. Seckford's Case.

Henry Seckford was impleaded in the Court of Common Pleas at the suit of a Widow in an Action of Debt, and now came an Injunction or Writ of Privilege out of the Exchequer, reciting the said Seckford to be one of the Grooms of the Queens Privy-Chamber, and Keeper of the Privy-Purse, and so Accountable to the Queen; and that they do not hold plea of the said Action; But that the Plaintiff sequitur per totam Scaccar. But the writ was utterly disallowed by the Court. See 16 Eliz. Dyer, 328. Hunt's Case.

Trin. 30 Eliz. In the Exchequer.

CCCI. The Queen and Littleton's Case.

Instrucion by the Queen against Littleton, and upon the general Issue, As to the House, The Defendant pleaded, Not guilty; and as to the Land and Park made Title, That Anne Talbot leased the same to him for years, &c. and the Jury found this special matter, scil. That Anne Talbot was seised, and leased the said House, Land and Park, to the Defendant for years, rendering Rent, with clause of Re-entry; And that after the said Lease so made, The said Anne said to the Lessee, Although I have not accepted it in my Lease, yet I mean to have the Chamber over the Kitchen to lay my Stuff in, until my Son come of years. To whom the Lessee answered, That he was well contented with that: Upon which the said Anne put in her Household Stuff there, and after-wards

Shep. Touch.
387.

wards she took to Husband Sir Robert Stapleton Knight; After which, all the Household-Stuff is removed out of the said Chamber by the said Sir Robert Stapleton and his Wife; who afterwards by their Warrant authorized J.S. to demand the Rent due at Michaelmas, who at the last day, limited for the payment of the Rent, went to the Premises, and demanded the Rent; to whom the Lessee said, That if the said J.S. would shew to the Lessee his Name, and make an Acquittance, and also shew his Warrant, he would pay him the Rent, otherwise not; but the said J.S. utterly refused, &c. wherefore the Lessee would not pay any Rent: And as to the other Rent (for several Rents were reserved,) The Lessee said to J.S. upon demand of the same, I here say, That there is already a forfeiture committed upon the last demand, and therefore it is to no purpose to pay the Rent; and further said, he had not any monies. It was moved by Popham Attorney General, That these demands made in manner, &c. were good; and that he who made the demand, is not bound to shew his Warrant; For he may be sufficiently authorized to make such demand without any Warrant in writing, no more than to tell his Name, or make an Acquittance; but the Lessee ought to pay his Rent at his peril, sub conditionis periculo, as in Case of an Obligation: And as to the Speech of Anne Talbot, concerning the Chamber over the Kitchen, and the answer of Littleton to that; The same doth not amount unto a Surrender, nor was it their intent, but only a permission, or sufferance for the said Anne Talbot to lay her Stuff there for a time as appeareth; for after the Stuff removed, the Lessee entred into the Chamber, and occupied the same as he did the rest. And afterwards exception was taken to this Verdict, because that here are two Issues, and but one Verdict, scil. as to the Land and Park, of Not guilty; and as to the House, he makes a Title by Lease; and the Jury have found the Lease, the Condition and the Re-entry for the breach of the same: If the special matter aforesaid doth amount to the same, and if, &c. then they say, that the Defendant is guilty of the whole: It was moved, That here is but one Verdict for the Lease; and the other Issue is not enquired of, and then all is discontinued. See 5 H. 5. 3. in Dower, the Tenant pleaded as to one part, Non tenure, and as to the Residue, Ne unq; seise; and afterwards the Verdict was found by the Verdict, but nothing found of the Non tenure, and therefore a Venire facias de novo was awarded, &c. But it was answered by the Court, That this Verdict had determined both the Issues; for, the Changeableness of the Entry, as the Court conceived upon the special matter aforesaid, did determine both the Issues.

Pasch. 31 Eliz. In the Kings Bench.

CCCIL Scot and Scot's Case.

THE Case of Scot and Scot in a Replevin, the which see Mich. 29 Eliz. Leon. 2 Part. 129. was argued again by Egerton, Solicitor General; And he said, In some Case, This word (Proviso) is not a Condition, but only an Explanation of the Sentence precedent: If it be in the Negative, and makes restraint of the Common Law, then it is a Condition: As a Lease for years, Proviso, That he shall not alien, or do Waste. And if the Proviso be in the Affirmative, and by that the party be bound to do a thing, which of common Right he is not bound to do, it is a Condition. A Lease for years, or for life, Proviso, That he shall pay such a sum. Lessee for years, Proviso, That the Lessee shall pay his Rent generally, without limitation of any day; it is on Condition. And he held by way of Argument in the principal Case, That Cestuy que use should take advantage of conditions, which are knit to Estates, as for payment of Rent, but not concerning collateral things; And such exposition of the Statute of 32 H. 8. hath been made there before. And admit it be a Condition, Yet the Lessor cannot re-enter, for the Rent was not well demanded; For 20 l. Rent is reserved yearly, payable at four Feasts, and here the Lessor hath demanded 10 l. scil. The Rent of two several Quarters, whereas only Rent was demandable in point of the Condition. Cook conceived, That it was a Condition; but every Proviso did not make a Condition: The Lessor covenants, That the Lessee shall take sufficient Wood, Proviso, that he shall not take great Timber; that Proviso doth not make the Covenant Conditional, but only explains the same: A Lease without Imprachment of Waste, Proviso, that the Lessee shall not do voluntary Waste, is not any Proviso, but a restraint of the Liberty given before, and doth but qualify the Liberty: As Littleton's Case. Grant of a Rent Charge, Proviso, that it shall not extend to charge the person of the Grantor; that Proviso doth not make the Grant Conditional, so that, if the Grantee bring a Writ of Amovment against the Grantor, the Grant be determined, &c. A Lease for years, Proviso, that if the Lessee shall be disposed to alien, that the Lessor shall have the first offer, &c. The same is not a Condition, which see by Fitzherbert and Baldwin, 28 H. 8. Dyer 13. A Lease for years upon Condition, That if the Lessee will hold over his Term, That then he shall pay so much Rent, the same is no Condition, for it is at the pleasure of the Lessee, &c. and it is not compulsory. A Feoffment in Fee with warranty, Proviso, that the Feoffee shall not vouch; the same doth not make the warranty Conditional, but only abridgeth the warranty. Sir Richard Peckhall leased certain Lands for years, and covenanted, That

1 Cro. 73.
2 Len. 128.
4 Len. 70.

the Lessee should take at his pleasure the Trees there growing; *Proviso*, That he should not take Trees of such a bigness: It was holden in that Case to be no Condition. So in the Covenant for further assurance, *Proviso*, That the Bargainor shall not be compelled to travail for the making of the assurance above ten miles, &c. But admit that it be a Condition, yet the Lessor upon the matter cannot take advantage of it; for he hath not demeaned himself in the demand of the Rent as he ought. For he hath demanded Rents due to him at several Quarters; and that he cannot demand in point of forfeiture, for then the Lessor may leave his Rent in the Hands of the Lessee until it amount to a great sum of 200 or 300 l. and then upon a sudden demand of the Rent, when the Lessee is not so well furnished, nor can be at so short warning, to pay the same. And it may be likened to the Case in 27 H. 6. A. granteth to B. ten Loads of Hay perceiving annuatim; out of his Meadows in C. for 21 years: there the Grantee cannot stay and take all his Hay, and the Arrears of it in the later year; but he ought to take his Hay every year according to his Grant, *Causa qua supra*. And although the Lessor here hath demanded more Rent than he ought, yet the Law shall construe the demand good for so much of the Rent, which by the Law is demandable in point of forfeiture; as where a Man is bound to perform the Award of such an one; who awards, That he and another shall be bound to another party for the payment of, &c. Although that the same Award be void as to the Stranger, yet it is good as to the party himself, and he ought to be bound by it. *Dr. Mollins Case*, A Lease for years rendring Rent to be paid at two days in the year; *Proviso*, That if the said Lessee do not pay the said yearly Rent, that then a Re-entry; that Rent is not demandable upon pain of forfeiture, but the last day of every year only, and not every year according to the Reservation of it. The words of our Condition are; *Provided*, That if the Lessee do grant his Term to his eldest Son, that he shall pay but so much Rent, the same without doubt is not any Condition; yet [he shall pay so much Rent] doth amount to so much. *Note*, In the Argument of this, this Case was put, A. is bound to make such an assurance to B. of such Land as C. shall devise; C. deviseth, That A. and his Wife shall make such assurance, A. is bounden upon the peril of his Obligation to do it. See as to this point of the *Proviso*, 5 Eliz. Dyer 222. *The Archbishop of Yorks Case*: It was adjourned.

CCCIIL. Mich. 31 Eliz. In C. B.

This Case was put to the Court, a Copyholder did alledge the Custom of the Mannor to be, That the Lord of the Mannor might grant Copies in the remainder, only with the assent of the Tenants, and not otherwise, and that Copies in Remainder otherwise granted should be void: It was demanded of the Court,

Court, If this were a good Custom or not; The Justices did forbear to deliver any Opinion in the Case: Walmesley Serjeant, That it was a void Custom; for that the Law doth not take notice of Coppholders Estate, they being but Tenants at Will, in the Judgment of the Common Law; and therefore it was not reasonable, that their Wills and Pleasures should limit the Lord of the Mannor in granting of Estates by Copy, and therefore he said, such a Custom was void; and he compared it to the Case in 2 H. 4. 27. That a Custom, That a Commoner shall not use his Common before that the Lord hath put in his Cattel, was holden to be a void Custom; On the other side, It was said, That this Custom might have a lawful beginning, and that it might be grounded upon the reason of the Common Law, That a Remainder should not be without the assent of the particular Tenant, and therefore that the Custom might be good; And it was said, That Wife should not have her Dower, unless she claimed it within a year and a day; that the same was adjudged to be a good Custom: The Court delivered no Opinion in the Case; but the Case was adjourned to another time.

CCCIV. Mich. 31 Eliz. In C. B.

THE Case was, a Man devised Socage Lands to his Brother's Son in tail, to have the same at his age of 25 years; and died, having Issue a Daughter: The Nephew after 21 years entred, and levied a fine, and afterwards accomplished his age of twenty five years. It was the Opinion of the whole Court, That the Issue of the Deviser was barred by this fine. For the Heir in Tail, and the Heir in Fee, are all one by the Statute of 4 H. 7. And it was holden, That this was not a fine which doth enure by way of Estoppel; but that it passeth the very right: It was said to be the same Law, If one who hath but a condition levyleth a fine, and afterward entreteth for the condition broken, &c.

Hill. 31 Eliz. In the Kings Bench.

CCCV. Palmer and Smalbrook's Case.

IN an Action upon the Case, The Plaintiff declared, That the Defendant had recovered a certain Debt against one A. and thereupon took forth a Capias against the said A. to Arrest his Body, and delivered the said Capias to the Plaintiff, being then Sheriff, and prayed a Warrant for the serving of the Capias, and that he would name to him one B. for a special Bailiff, and promised the Plaintiff, That if B. Arrested A. by force of the said Capias, and suffered him to escape, that he would not sue him for the said escape; and further declared, That he made a Warrant according to the said Capias, and therein named and appointed the

1 Len. 132.

Owen 97.

1 Cro. 178.

said B. his special Bailiff, who Arrested A. accordingly, and afterwards suffered him to escape; and that the Defendant notwithstanding his Promise aforesaid, sued the Plaintiff for the said escape, and it was found for the Plaintiff: And it was moved in stay of Judgment, That that Promise was against the Law, to prevent the punishment inflicted by the Statute of 23 H. 8. upon the Sheriff, and that it is merely within the said Statute, and so the Promise void. Cook, This is not any Bond or Promise taken of the Prisoner, nor of any for him; and therefore it is not within the Statute, and it was Davies Case: Wray, A Promise is within the Statute as well as a Bond. But the Statute doth not extend, but where the Bond or Promise is made by the Prisoner, or by some for him; And afterwards, Judgment was given for the Plaintiff.

Trin. 31 Eliz. In the Kings Bench.

CCCVI. Wood and Payn's Case.

IN an Ejectione firmæ, for Entry into a Messuage five Tenementum, and 4 Acres of Lands to the same belonging: Upon not guilty pleaded, it was found for the Plaintiff. It was moved by Cowper, Serjeant, That the Declaration is uncertain, Messuagium five Tenementum, quod fuit Concessum. Cook, We will release our damages. Kemp, Then your Costs are gone also. Cowper, You cannot have Judgment of the 4 Acres; for the Declaration is 4 Acres to the said Messuage or Tenement belonging, and for the incertainty to which thing belonging. But to that it was said, That as to the 4 Acres, it is certain enough; for the words, To the same belonging, are merely void. And afterwards the Plaintiff released damages, and had Judgment.

Trin. 31 Eliz. In the Kings Bench.

CCCVII. Bennington and Bennington's Case.

Bennington brought an Action of Trespass against Bennington, for breaking of his Close, &c. The Defendant pleaded, That long time before the Trespass supposed, That it was the Freehold of one Joan Bennington, and that he as her servant, and by her Commandment entered; upon which they were at Issue. And it was found, That for two parts of the Land where, &c. in three parts to be divided, it was the Freehold of the Plaintiff; and for the other part, that it was the Freehold of the Defendant: and by the clear Opinion of the whole Court, The Plaintiff could not have Judgment, for now it appeareth, That the Plaintiff and Defendant are Tenants in Common, betwixt whom an Action of Trespass doth not lie; and although this Tenancy in Common be

be not pleaded, but found by Verdict; yet it was the Opinion of the Court, That it is all one.

Hill. 31 Eliz. In the Kings Bench.

CCCVIII. *Brereton and Aufer's Case.*

John Brereton of the Inner-Temple, brought a Writ of Error against Aufer, to Reverse an Outlawry; And the Case was; That the said Aufer had caused the said Brereton to be endicted; upon the Statute of Magna Charta, and divers other Statutes; For that, Whereas the said Aufer had sued the said Brereton in a Bill of Debt in the Court of Request against the said Brereton; and by the said Suit procured the said Brereton to be imprisoned; Upon which Endictment, Brereton was Outlawed; And Error was assigned in the Outlawry, because whereas the Endictment was taken in Middlesex, the Exigent upon it was in London; whereas it ought to issue out of Middlesex; but the proclamations issued in the County whereof he was named Nuper; and that was peremptory, for if he make default upon that Process, he shall incur the danger of a Praemunire: And for that cause, the Outlawry was reversed. Also, the party was discharged of the Endictment; for this Suit in the Court of Requests, as it appeareth upon the Endictment, was before Judgment in the Bill of Debt.

Hill. 31 Eliz. In the Kings Bench.

CCCIX. *Constable and Farrer's Case.*

In an Action upon the Case upon an Assumpsit, the Plaintiff declared, That whereas the Defendant had brought an Action against him, the Issue in which ought to be tried at the next Assises at N. the Defendant in Consideration that the now Plaintiff should confess the Action aforesaid at the Assises holden the 4th of August, promised that he would stand to the Arbitrament of J.S. for the said matter: And upon Non Assumpsit, the Jury found That the Defendant made such a Promise the 5th of August, but not the 4th of August.

Cook, I conceive, That upon this Verdict the Plaintiff shall have Judgment; for in truth the Assises began the 4th of August; and the Consideration was, That the now Plaintiff should confess the Action at the same Assises; which although they continue divers days, yet in Law, all is but one day; And all the Assises shall be said to be holden the 4th of August: so as of necessity, we must lay the promise accordingly. And it is a clear case, That the Plaintiff in an Action upon the Case, shall declare upon a Promise the first day of May; And if it be found, that it was made at another day, yet the Plaintiff shall recover.

Mich.

Mich. 31 Eliz. In the Kings Bench.

CCCX. Hamper's Case.

2 Len. 211.
1 Cro. 147.

HAmper was Endited upon the Statute of 5 Eliz. of Perjury; And in the body of the Endiament, the Record was, that he falso & deceptive deposuit: Whereas the Statute speaks (Willfully;) And although in the perclose of the Endiament, the Conclusion is, Et sic commisit voluntarium perjurium: Yet the Opinion of the Court was, That the same did not help the matter; and for that cause the party was discharged: For contra formam Statuti, will not help the matter; and yet it was moved and urged, that contra formam Statuti did supply such defect. And in this case, It was holden by the Court, That if a Witness deposeth falsely, but the Jury do not give credit to his Oath, but give their Verdict against his Oath, although the party grieved cannot sue him for the Perjury; yet at the Suit of the King, he shall be punished.

Trin. 31 Eliz. In the Kings Bench.

CCCXI. Collet and Robston's Case.

Ante 149.
192.
2 Len. 118.

ARthur Collet and Thomas Andrews recovered against Robston in a Writ of Accompt, Hill. 29 Eliz. And now Robston brought a Writ of Error, and assigned for Error, That whereas the said Writ of Accompt was brought against the Defendant as Receiver of monies to render Accompt quando ad hoc requisitus fuerit, the said Writ ought to have been more special: But the Writ in its generality was holden good enough without any special matter. And so it was adjudged in the Case of one Gomersell; scil. Quod reddat ei rationabilem Computum suum de tempore quo fuit Receptor Denariorum ipsius A. Another Error was assigned; For that the Jury had assessed damages, which ought not to be done in an Action of Accompt. Which see, 2 Ric. 2. Fitz. Accompt, 45. and 2 H. 7. 13. But see the Book of Entries, 22. In a Writ of Accompt against one as Receiver, for to render Accompt, damages were given by the Jury for the Plaintiff: And in the Case of an Accompt against one as Bailiff, damages shall be given: For if my Bailiff by the employment of my monies whereof he was Receiver, might have procured profit and gain unto me, but he neglects the same, he shall be chargeable to me to answer the same. And here in our Case, damages shall be given ratione implacitationis. And afterwards, notwithstanding the Exceptions, the Judgment was affirmed.

Trin.

Trin. 31 Eliz. In the Kings Bench.

CCCXII. *Tates's Case.*

YATES and another brought a Writ of Error upon a Judgment given in a Writ of Partition; and assigned for Error, That the Partition was not sufficient; For it is there set forth, That the Plaintiffs in simul & pro indiviso tenent cum defendente, &c. and doth not say what Estate. See F.N.B. 61 & 62. In simul et pro indiviso tenent de hereditate, which was of A. matris of the Plaintiff and Defendant. And yet see F. N. B. 62. A Writ of Partition betwixt strangers, without naming de hereditate in the Writ. And see also, that Partitions of Lands in London, without shewing of what Estate. See Register, 67. 6 Eliz. in Partitione facienda by Courtney against Polyweel, no Estate shewed in the Writ. 26 Eliz. Between the Lord Cheney and Bell. So between Finch and Tirrell; And so between Fry and Drake, 14 Eliz. And 4 & 5 Phil. & Mary, It was holden, That it is not necessary in such Writ to shew the Estate: But Tenants in Common ought to shew the same in their Declaration. 2 Len. 113.
1 Cro. 759, 760.

CCCXIII. *Hill. 31 Eliz. In the King Bench.*

AN Action upon the Case was brought for these words, scil. Thou hast forged my hand: It was holden by Gawdy and Wray, Justices, That such words are not actionable, because too general, without shewing to what writing: And by Wray, these words, scil. Thou art a forger, are not actionable, because it is not to what thing he was a forger.

Godfery, Between Warner and Cropwell; scil. She went about to kill me; An Action lieth for them: for if they were true, she should be bounden to the good behaviour.

And by Gawdy, for these words, scil. Thou hast forged a Writing; They are not Actionable, because they are incertain words: Which Wray, concessit: But if the Declaration had been more certain, as (innuendo) such a deed, then it had been good enough.

Fuller, A Case was betwixt Brook and Doughty; scil. He hath Counterfeited my Lord of Leicester's hand unto a Letter against the Bishop of London; for the which he was committed to the Marshalsey for it. And it was holden, Not Actionable. And afterwards, in the principal Case, Judgment was, Nihil Capiat per Billam.

Mich.

Mich. 31 Eliz. In the Kings Bench.

CCCXIV. *Delabroche and Barney's Case.*

DElabroche was sued in the Admirall Court, upon an Obligation supposed to be made and delivered in France; and now he prayed a Prohibition. It was holden by the whole Court, That such a Bond might be sued here: but being begun in the Court of Admiralty, we cannot prohibit them; for that perhaps, the Witnesses of the Plaintiff are beyond Sea; which may be examined there, but not here.

Mich. 31 Eliz. In the Kings Bench.

CCCXV. *Moulton's Case.*

This Case was moved to the Court by Cook, That one Robert Moulton Tenant in tail, having Issue two Sons, Robert and John, died seised; And that Robert his Son and Heir, levied a Fine thereof; and afterwards levied another Fine, and died without Issue. And John brought two several Writs of Error, to reverse both Fines: And the Tenant to the Writ of Error brought upon the first Fine, pleaded the second Fine in bar of it: And in bar of a Writ of Error brought upon the second Fine, he pleaded the first Fine. The Court advised him to Reply, That the Fine pleaded in bar, was erroneous. See 7 Ed. 4. 107. Where a Man is to annul an Outlawry, his person shall not be disabled by any other Outlawry.

Mich. 31 Eliz. In the Kings Bench.

CCCXVI. *Babington and Babington's Case.*

In Debt brought, The Defendant pleaded an Attachment made in London after imparlance. It was adjudged, That it was not any plea. And Wray said, That the same should be observed for a Rule in other Cases. After that plea was disallowed; The Defendant pleaded Variance betwixt the Obligation and the Declaration; For the Obligation was Randal Bab. And the Declaration was ad respondend. Randulpho B. *alias* Randal B.

Cook said, That Randulphus, is Latine for Randal. Owen, Serjeant, shewed divers Presidents, where Randulphus was taken for Randal. But the Court did not agree upon it.

Wray advised the Plaintiff for his more speed to bring a new Writ. But Gawdy said, That the Writ brought was good enough.

Mich.

Mich. 31 Eliz. In the Kings Bench.

CCCXVII. *Pike and Hassen's Case.*

An Action upon the Statute of 32 H. 8. touching buying of Titles; And the Bargain was laid in Norfolk; but the Land, &c. was in Suffolk; And the Issue was tryed in Norfolk, and the value of the Land also: And as to the 5 Acres they found the Defendant guilty; and found also the value of them: And for the Residue, a Special Verdict was given; and for the 5 Acres, the Plaintiff had Judgment presently: And by the Special Verdict it was found, That the Defendant had occupied the Residue of the Land for two years before, &c. as Tenant at sufferance; and afterwards sold the Inheritance.

Wray, Chief Justice, Tenant at sufferance is in truth a Tortfeasor, by which his taking of the profits is not such as is intended by the Statute: But yet he afterwards looking into the words of the Verdict, which were, That the Defendant tenuit the Lands for two years ex permissione of another; thereupon it ought to be intended, That he was Tenant at will.

Mich. 31 Eliz. In the Kings Bench.

CCCXVIII. *Sparry and Warfield's Case.*

In False Imprisonment against the Defendant and others; they pleaded, The Charter of Bridewell; and that the Plaintiff was mali nominis & famæ, and that certain Goods were stolen from J.S. and upon search, the Plaintiff was found suspiciously, &c. And that thereupon they put him into Bridewell. It was the Opinion of the Justices, That the Plea was not good.

Pasch. 32 Eliz. Rot. 318. In the Kings Bench.

CCCXIX. *Bragg's Case.*

In an Action of Trespass by Strait against Bragg, Quare Clausum fregit, containing one Acre in C. in the County of H. and for the taking of a Horse. The Defendant pleaded, That long time before the Trespass, The Dean and Chapter of Pauls were seised of the Mannor of C. in the said County, in Fee in the right of their Church, whereof the place where is parcel, &c. And so seised, King E. 4th by his Letters Patents dated Anno 7 of his Reign, granted to them all the fines pro Licentia Concordandi of all their Homagers and Tenants resiants, or not resiants, within their Fee; And shewed, That for all that time they have used to have such fines of their Tenants; And shewed further, That, 29 Eliz. A

D h

Fine

Fine was levied in the Common Pleas between the Plaintiff and one A. of 11 Acres of Land, whereof the place where the Cref-pals was done was parcel, and the Post-Fine assessed to 15 s. And afterwards Scambler the foreign Opposer allowed to them the said 15 s. because the said Land was within their Fee; and afterwards in the behalf of the said Dean and Chapter, he demanded of the Plaintiff the said 15 s. who refused to pay it, for which he, by the Commandment, and in the right of the Dean and Chapter, entered and took the said Horse in the name of a Distress as Bailiff to the said Dean and Chapter for the said 15 s. and afterwards sold it, &c. upon which the Plaintiff did demur in Law; And it was moved, That here it is not averred, That the Land whereof the Fine was levied was within their Fee; but they say, That Scambler allowed it because it was within their Fee. And that is not a sufficient averment quod curia concessit: And also the opinion of the Court was, That the Dean and Chapter cannot distrain for this matter, but they ought to sue for the same in the Exchequer, as it appeareth, 9 H. 6. 27. in the Duchels of Summersets Case.

Ante 56.
2 Len. 179.

Gawdy Justice, The Grant doth not extend to the Post-Fine; for the Fine pro licentia Concordandi, is the Kings Silver, and not the Post-Fine.

Wray Justice, All passeth by it; for it is about one and the same matter; And they in Opinion, to have given Judgment for the Plaintiff. Quære of it.

Mich. 32 Eliz. In the Exchequer.

CCCXX. *South and Marsh's Case.*

NOte: It was holden by the Court, That where Marsh was indebted unto South, without any Obligation for it, but only by a Note in writing signed with the Hand of Marsh; scil. By me, W. Marsh; but not sealed, that such a debt might be assigned to the Queen; although that before the Assignment against a Creditor he might have waged his Law; for, in as much as by these Notes and Bills the certainty of the debt appeareth, and being true debts, they may well be assigned. See 21 H. 7. 9. An Obligation may be assigned to the Queen without Deed enrolled; and where the Obligee is not indebted to the Queen: But it cannot be assigned to a subject, if not for a debt due by the Assignor to the Assignee; for otherwise it is Maintenance. And in this Case it was holden, That where the King sues for a debt assigned to him, the Obligor cannot plead Nihil debet; for now by the Assignment it is become matter of Record.

Noy 52.

Mich.

Mich. 32 Eliz. In the Kings Bench.

CCCXXI. Trapp's Case.

Robert Trapps, 1 Eliz. leased of 15 Messuages in Clarken-well; in the Occupation of 15 several persons; viz. A.B.C. &c. and named them certain, demised them to one Cox; And afterwards; conveyed the Inheritance of them to one Brian Trapps, in Fee; who afterwards demised to J.S. all those 15 Messuages in Clarken-well, which Robert Trapps did demise inter alia to Cox by Indenture dated 1 Eliz. now in the Occupation of A.B.C. &c. And one of the Occupiers names was left out in the recital: And it was holden by the whole Court, That notwithstanding the said Omission, the said Messuage did pass; for there was sufficient certainty before; and the fault came after the verity.

Mich. 32 Eliz. In the Kings Bench.

CCCXXII. Brewin and Mansfield's Case.

In an Action upon the Case, the Plaintiff declared, That A. was indebted to him in 10*l.* and made the Defendant his Executor, and died; And that the Defendant in Consideration, that the Plaintiff would forbear the Defendant for a certain time, promised to pay it at two several days, and shewed which in certain. And it was found for the Plaintiff. It was moved in Arrest of Judgment, That it is not set down in the Declaration, by what portions the 10*l.* shall be paid.

Clench, Justice, conceived, That the Defendant had liberty to pay it in what portions he pleased.

Gawdy, He ought to pay it by equal portions, as a Rent reserved payable at two feasts, without saying by what portions it shall be paid. And he said, That if the plea for the cause aforesaid had been defective; yet now after Verdict all is helped, for it is but form. And afterwards, the Opinion of the whole Court was, That the matter shewed was not good to stay Judgment. Wherefore the Plaintiff had Judgment to recover.

CCCXXIII. *Mich. 32 Eliz. In the Common Pleas.*

The Case was; The Plaintiff in a Second Deliverance is Non-suit, and a Writ awarded to enquire of the damages, and returned; And the Defendant had a Writ de Retorno habendo; upon which the Sheriff returned Quæ averia elongata: upon which, a Wicheham is awarded; By which all the other Cattel of the Plaintiffs were delivered to the Defendant: And after a years time, the Plaintiff came into Court, and paid the damages and

1 Len. 220.

Costs recovered against him. And the Opinion of the Court was, That he should have a Special Writ to the Sheriff, reciting the whole matter, to restore the Plaintiff his Goods taken in Withernam, without any allowance for the keeping in the mean time; For it is intended, that their labour, or other profits by them, doth counterball such charge. And Brooker, Prothonotary, said, That he had a President to that purpose, of 12 Eliz.

Mich. 32 Eliz. In the Kings Bench.

CCCXXIV. Dalton and Selby's Case.

UPON an Attachment removed out of London, a Procedendo was prayed; And the Case was, That one Brooks was indebted to Dalton, and Selby was indebted as much unto Brooks: Dalton attached the Debt in the hands of Selby, and the Debt of Brooks was not yet due. And it was said, That that Debt not being yet due, was not Attachable by the Custom; For Dalton could not affirm a Plaint of Debt against Brooks, before that the Debt was due; But if the principal Debt had been due, Dalton might have attached the said Debt that Selby owed to the said Brooks, although that Debt was not due. And such was the Opinion of the whole Court. See 21 E.4.67. 22 E.4.30,31. 22 H.6.47.

Mich. 32 & 33 Eliz. In the Kings Bench.

CCCXXV. Mead and Bigott's Case.

IN an Action upon the Case by Mead against Bigott, the Plaintiff declared, That W. Arnold had levied a Plaint of Debt in the Court of the Hanno of Stepney against Stokes; And whereas the said Arnold had procured a Warrant directed to the Plaintiff being Bailiff of the Hanno, and Minister of the said Court, to attach the said Stokes by his Goods to answer to the said Arnold at such a Court, &c. And whereas by vertue of the said Warrant, the Plaintiff had attached the said Stokes by two Quarters of Wheat, being the Goods of the said Stokes, to answer the said Arnold in the said Plaint: And whereas the Plaintiff had delivered the said Wheat to Jane, Wife of the said Arnold, to keep until the next Court: The Defendant in Consideration thereof, promised to save the Plaintiff harmless concerning the said Corn. And it was holden, That here is not any Consideration: For it is against Law, for such an Officer in such a Case to deliver a thing attached, ut supra, to the Plaintiff or to his Wife. Also the Consideration was a thing executed before the promise: Also a Man cannot be attached by Corn. And afterwards Judgment was given against the Plaintiff.

Mich.

Mich. 32 & 33 Eliz. In the Exchequer.

CCCXXVI. Broughton and Prince's Case.

Broughton, an Apprentice of the Inner-Temple, being Farmor to the Queen, exhibited a Bill in the Exchequer, Quo minus, &c. against Prince, a Practicer of the Law in the Marches of Wales, for maintaining one J.S. in a Suit, against the Statute of Maintenance.

1 Cro. 725.
Tryal per
pays 175
Owen Rep.
128, 227.

To which the Defendant pleaded, That he was Consiliarius & in lege eruditus, &c. and so justified. And now it was moved by Atkinson, on the part of the Defendant, That by the Statute of 18 Eliz. Cap. 5. That no Informer shall sue any person upon any Penal Statute, but by way of Information, or Original Action, and not otherwise, And here the suit is by Bill, which cannot be warranted by the Statute. And he conceived, That this suit is brought upon the Statute of 1 R. 2. cap. 4. upon which Statute, no prosecution shall be in the name of the Subject only, but it may be in the name of the King only. See the Book of Entries, 393. Where the suit is, tam pro Domino Rege, quam pro seipso: And there by the King only, and there by the party only. And as to the Statute of 32 H. 8. cap. 9. suit upon the same ought to be, tam pro Domina Regina, quam pro seipso: Which see in the Book of Entries, 395. Also by the Statute of 31 Eliz. cap. 5. The suit brought, ought to begin within one year after the offence committed: And in our Case, the offence upon which the suit is conceived, was committed 3 years before the Information brought; and it cannot be added, because that the Plaintiff is the party grieved; for every Statute made against Maintenance is Popular.

Broughton said, We have Replied to the Defendant, That he is a Lay Man, et non in Lege Eruditus; and prayed, that the same might be enquired of by the Country: And the Defendant Prince likewise, and so Issue is joyned: And because you have such Objections, they shall be saved to you to move in Arrest of Judgment.

Atkinson, I may offer them as well now to the Jury, as well as in Arrest of Judgment. And afterwards it was moved, That the Defendant might demur upon the Replication, if he would; and if not, the Issue should be tried: And if then it pass against the Defendant, that then he shew the matter in Arrest of Judgment; for no Exception shall be allowed for staying of the Enquest, if it be not an apparant fault, and not only a doubt.

At another day the matter was moved; and then it seemed to the Barons, That the Plaintiff here being Pars grava, was not restrained to any year after the offence committed, but that restraint did extend only to Common Informers. The Defendant pleaded, That he was admitted in Societatem interioris Temples, and there remained a Student for so many years; And that he was

homo

homo eruditus in Lege, and a Counsellor, and took his Fee; &c. The Plaintiff by Replication, said of his own wrong without that, that the Defendant is homo Conciliarius & in lege eruditus, & hoc petit quod, &c. ut supra. And Atkinson took Exception to the Traverse and Conclusion of it, Et hoc petit quod inquiratur per Patriam; for that cannot be tryed by the Country, but by the Judges: For here is a Question of the Learning of the Defendant, and that is to be tryed: and his sufficiency in this Learning is to be discerned by those who are skillful in the Laws of the Land; For if a matter in Law is to be tryed by the Judges, a multo fortiori, the Learning of the Law is to be tryed by them; for that is more difficult to be judged. As, where the Ordinary refuseth a Clerk for insufficiency in learning, upon which they are at Issue, the same shall not be tryed by the Country, but by the Bishop: Which see Articuli Cleri, cap. 13. *de Idonietate presentata ad Beneficium Ecclesiasticum pertinet Examinatio ad Judicium Ecclesiasticum*, 40 E. 3. 25. And see the Statute of 18 Eliz. that Pars gravata in the Case of Maintenance, is not tryed to a year. And this suit is conceived to be in such Quality, being a private grievance to the party himself; the King not being party, but only the party grieved: But where the penalty is expressly given to the King, and him that shall sue, there all the proceedings ought to be in both their names.

And Manwood, Chief Baron, said, That this Issue shall be tryed by the Country. Which see in the Book of Entries, 396.

Mich. 32 & 33 Eliz. In the Exchequer.

CCCXXVII Owen Morgan's Case.

OWEN Morgan Exhibited an Information upon the Statute of Usury, for an usurious Mortgage made; and charged the Defendant, That Cepit ultra 10l. in Cl. for the forbearance for one year, and that was out of the Issues, Rents, and Profits which he took in Middlesex, of Lands in Glamorganshire in Wales Mortgaged to the Defendant.

Manwood, Chief Baron said, That one might take the Rents of Lands in Wales in the County of Middlesex, but a Man cannot take the Issues and Profits of the Lands, but where the Lands are: And Leak's Case was cited, Where an Information was brought for cutting down of Wood, and converting it into Coals: And Leak the Informer said the cutting to be in the County where the Wood grew, but the Conversion of it into Coals in the County of Middlesex.

And Manwood said in the principal case, That the taking of the Issues and Profits ought to have been layed where the Land was. And such was the Opinion of the whole Court.

Mich.

Mich. 32 & 33 Eliz. In the Exchequer.

CCCXXVIII. *Curson's Case.*

Curson acknowledged a Statute to Starkey, Alderman of London; and afterwards he acknowledged another Statute to one Hampden, who assigned the same to Fitton, who assigned the same to the Queen: Starkey sued forth Execution upon his Statute; and thereupon the Land is extended of Curson; and he hath a Liberate of it. It was agreed by all the Barons, That if Starkey had execution upon the Statute before the Queen, his Execution should stand against the Queen, and the Queen should not put him out. And it was further agreed by them, That if A. recovers a Debt in the Common Pleas, so as he hath title to sue forth Execution by Elegit, and the Defendant sells his Lands, and afterwards A. assigns his Execution to the Queen, That the Queen should not have prerogative against the Feoffee to have execution of the whole Land. 4 Len. 10.
Ante 239.

And it was also holden by Manwood, Chief Baron, That if Execution be had upon a puisne Statute, and the same is afterwards avoided by more ancient Statute; and afterwards, the ancient Statute is satisfied, That now the puisne Recognisee may re-enter without suing forth any new Execution.

Mich. 32 & 33 Eliz. In the Exchquer.

CCCXXIX. *Butler and Lightfoot's Case.*

In this Case, It was holden by the Barons, That if Tenant for life be of a Copphold, the Remainder over in Fee to another, he in the Remainder may surrender his Estate, if there be not any particular Custom to the contrary; for, the Estate of Tenant for life and him in the remainder, are but one Estate; and the admittance of the particular Tenant, is the admittance also of him in the Remainder. 4 Len. 9.

Mich. 32 Eliz. In the Common Pleas.

CCCXXX. *Knight and Norton's Case.*

It was holden in this Case, That dures of Imprisonment is not intended but where the party is wrongfully imprisoned until he make the Bond; and not where a Man is lawfully imprisoned for another cause, and for his delivery he makes a Bond; for that is not per duritiam imprisonamenti; And if in such Case dures be pleaded, the other may say of his own accord sine duritia imprisonamenti, without saying absq; hoc, that it was per duritiam imprisonamenti. And so it was also holden in the Kings Bench. See 4 E. 4. 17. 12 E. 4. 7.

Trin.

Trin. 32 Eliz. In the Exchequer.

CCCXXXI. *Hungate and Hall's Case.*

*Ante 239.
4 Len. 10.*

The Case was, Curson acknowledged a Statute to Alderman Starkey, and afterwards acknowledged another to Hampden, which was assigned to the Queen; Afterwards, the Lands of Curson were extended for Starkey, and a Liberate thereof. It was holden by the Court, That the same was a good Execution, and that the Queen should not avoid it: But if the Land had been extended at the suit of the Queen, then the Execution of the Queen should hold place, although it were a Statute of a pulleine date.

And by Clark, Baron, If a Recognizance acknowledged by a Subject be assigned to the Queen, It hath been a Question, If all the Lands of the Conusor shall be extended, or but the moiety, as it shall be at the suit of the Conusor himself? It was holden, That all the Lands should be extended.

Trin. 32 Eliz. In the Exchequer.

CCCXXXII. *The Lord Gray's Case.*

The Lord Gray, Tenant of the King of Lands holden in Capite by Licence of the King, made a Feoffment of the Lands in Fee, and afterwards levied a Fine for further assurance: And upon Process, the party came into the Court, and shewed this matter: And the party was advised by the Court to aver, That the said Fine was for further assurance: And then upon such averment, he should be discharged without any Pardon sued for by the Fine, &c.

Trin. 32 Eliz. In the Exchequer.

CCCXXXIII. *Sir Walter Waller's Case.*

1 Len. 29.

4 Len. 44.

In Sir Walter Waller's Case, It was holden in the Court of Exchequer, That a Debt of Record, as upon a Judgment, &c. could not be attached by the Custom of London. And so it was holden in the Case of Sir John Perrot, in the Common Pleas.

And it was said by Cook, That such a debt could not be assigned upon the Statute of Bankrupts.

Mick.

Mich. 32 Eliz. In the Exchequer.

CCCXXXIV. Sir Brian Tucke's Cafe.

In this Cafe, It was holden by all the Barons clearly, That the Executoꝝ of an Executoꝝ should not be charged with a Devastavit made by the Executoꝝ of the first Testatoꝝ, no not in the Cafe of the King, because it is a personal wrong onely.

Office of Ex-
 ecutors, 232.
 Roll. 920.
 Savile 40.

Mich. 32 Eliz. In the Exchequer.

CCCXXXV. Fines and the Lord Dacre's Cafe.

The Cafe was; Tenant in tail, the Remainder of Lands in chief, lewyed a Fine of them without Licence of the King; and, if the Tenants of the Lord Dacres should be charged for the Fine, was argued: For the Cafe was, That the Lord Dacres was Tenant in tail, the Remainder in tail to Philip Fines. And it was holden by all the Barons, That the Tenants Lands should be discharged: But it was holden, That if the Comisoꝝ had any other Lands within England, the Fine might be lewyed thereupon; But then the Question was, If the Tenants should be put to plead the same in discharge, or that the same should be discharged without pleading; because it appeareth upon Record, That he who aliened was but Tenant in tail, in Remainder: For there was an Office found of that which was pleaded by another in another Cause. The Opinion of the Court was, Where such matter appeareth of Record; as by Office, Libery, &c. there the party needs not to plead such matter in discharge; for the pleading of it is to no other purpose, but to satisfy the Court by the Record, that the matter is so as the party hath alledged; and therefore the Barons gave Order, That the Process against the Tenants of the Lord Dacres should be stayed.

Post. 261.
 4 Len. 97.

Trin. 32 Eliz. In the Exchequer.

CCCXXXVI. George Ap-Rice's Cafe.

In the Cafe of one George Ap-Rice, The matter was, That Tenant in tail after possibility of issue extinct, assigned over his Estate unto A. against whom he in the Reversion brought a Quid juris clamat; and Judgment was given, that he should atcoꝝn; and upon his refusal, he was committed to Prison, and divers Fines set upon him, and executed in the Exchequer; It was moved, That these Fines were imposed upon the party against Law. And the Opinion of the Court was, That when Judgment is given in a Quid juris clamat for the Plaintiff, Distresse infinite shall be against

Ante 127.

If the

the Defendant to bring him in to attorn; and when he comes in, if he refuse, he shall be imprisoned, until he attorn. It was also holden by the Court, That the Fines were not lawfully assessed and imposed upon him; And it was said, That it had been adjudged in a Court of Wales, That the Assignee of Tenant in tail after possibility of issue, should attorn; upon which Judgment, a Writ of Error was brought in the Kings Bench; and there, upon good advice, the said Judgment was affirmed. For although it be true, That Tenant in tail after possibility shall not be compelled to attorn; yet that is a privilege which is annexed to his person, and not to the Estate; and, by the assignment of the Estate, the privilege is destroyed.

Mich. 32 Eliz. In the Kings Bench.

CCCXXXVII. *Harris and Wing's Case.*

More Rep.
4.5.

Ante 5,6.

IN the Case between Harris and Wing; The first point was, That the Lease made by Queen Mary was void. 1. Because a former Lease of Record was not recited in the Letters Patents of it: The reason wherefore such recital ought to be, is not, as hath been alledged by Cook, Quia circa solium Regis subsistunt iustitia & veritas; and then when there is a former Lease in Esse, the King makes a Lease in possession, the same cannot stand together, so as there is not Iustitia & Veritas; but the very reason thereof is so high, that he cannot take, &c. but by matter of Record; and if that be mistaken, it makes all void: and therefore, In Petitions of Right, and Monstrans de Droit; If the King be not enforced of all the Titles, all is void. And therefore in the Case between Sir Moyle Finch and Throgmorton, which now depends in the Exchequer; which was this, The Queen made a Lease for years rendering Rent, with a Proviso, That if the Rent be behind, That the Estate shall cease: the Rent is behind, the King granted the same over to Sir Tho. H. It was first moved, If the same Lease should cease without Office. And it was holden by Popham, and many other grave and learned Men, upon a Conference, That the said Lease should cease without Office; for the Contract which is upon Record is determined and ceased, by which the Estate which was created by the said Contract shall also cease without Office. But yet the Lessee continued in possession notwithstanding that, and took the Profits; but thereof after office found, he rendered recompence to the Queen: And it was holden there, upon the said Conference, That the Queen in her Grant to Sir T.H. of the said Estate which was now ceased, ought to recite that Lease; For the Tenant is in possession, and could not be punished for his occupation before Office. So in the Case of the Vicarage of Yatton, 17 Eliz. Dyer 339. The presentment being devolved to the Queen by Lapse, the Ordinary collated A. and afterwards the Queen

Queen presented B. who brought a Quare impedit; depending which, A. proved another Presentment of the Queen, without mention or recital of the first Presentment, and the same was holden void; for, in that, the first Presentment is not recited, nor the pleasure of the Queen to revoke it; and therefore it was in disceit of the Queen. So the Case 18 Eliz. Dyer 352. An Abbot leased for 60 years; the Lessee made a Lease for 80 years, the Reversion came to the King; the 60 years expired, the second Lessee surrendered to the King *ex intentione*, that the King would re-grant the same to him for 20 years remaining. The King reciting the Indenture and Surrender, *ex certa scientia* granted for 20 years: It was holden by the Court, That the Grant was void, because the King was misinformed, &c. It hath been Objected, That here needs no recital; for that the Lease to be recited is ended, eo instante that the new Lease beginneth. Sed distinguenda sunt tempora; aliud est facere, aliud perficere; the first Lease is ended, when the new is perfected, and the Great Seal put to it. The second reason wherefore the Lease shall be void, is, because otherwise the Grant of the Queen shall enure to two Intents. 1. To make a Lease. 2. To accept a Surrender; and how can the Queen accept a Surrender of an Estate, of which she hath not notice? for she is not informed of it by any Record, without which she cannot take notice of any thing. See 7 E. 4. 30, 31. Baggotts's Case; The King granted an Office to an Alien, the same shall not enure to make him a Denizen, for then it shall enure to two intents, &c. The words of the Grant of Queen Mary, are, *Omnia tenementa nostra*; and, If by that a Reversion shall pass, was the Question: Certainly, *In verbis ambiguis Intentio sumenda est*; Then here in our Case, by this Patent, is other Land which should pass, and the Reversion is *nostra*; but in property, not possession: Wherefore here (*Nostra*) shall be restrained to that which is in possession. Where there are general words in Grant of the King, they ought to be served; but if they can be served, they shall be taken in a common and general sense; but the words shall not be stretched. But if they cannot be served, then they shall not be void, but the King shall be rather prejudiced; and always the Grant of the King either may be served or taken to a common intent, 2 H. 3. 4. *Qualibet Concessio Domini Regis capi debet stricte contra Dominum Regem, quando potest intelligi duabus viis*: As if two be jointly indebted to the King, and the King pardons to one of them *Omnia debita*, the same shall not extend to joint Debts, but to those Debts of which he is only Debtor, 40 E. 3. The King granted to a Subject the fines and Amercements *hominum suorum*; All which hold of him by Homage, may be said *homines suos*; and also his Vassals are, *homines suos*; but because the general words may be served, the said Grant shall be taken to extend to his Vassals only. So in our Case the general words may be served with Lands in possession, and shall not extend to

Lands in Reversion. At another day the Case was argued by Popham Attorney General, and he conceived, That by the Lease made 2 Mar. both the former Leases, as well that which was made by Henry the eighth, as that which was made in Reversion by the Bishop of Bath and Wells, are gone. Lessee for term of years to begin at a day to come, accepts a new Lease in possession, which is to continue until the future Interest shall commence, the future Interest is gone; and in Barkings Case, 2 Eliz. It was holden by Dyer and Brown, that where Lessee for two years accepts a new Lease to begin two years after, this new Interest of a term determines the present Interest. For as the Lessor cannot contract with a Stranger for the Interest of a Term, which is to have continuance during a former Term; by the same reason, when the first Termor will accept an Interest of a Term from his Lessor to begin at any time during his former Estate, this new Interest determines the first. So, if one hath an Interest of a Term to begin at a day to come, and he before the beginning of that Interest accepts a Lease for life, his first Interest is gone. The words of the Patent are, All her Interest, Lands and Tenements, in the Parish of St. Cuthbert in Wells, and parcel of the possession of the late Priory of R. and if these general words will carry Lands in Reversion, where other Lands in possession pass, &c. was the Question. General words shall have a special understanding, if the special Construction may agree with the proper signification and sense of the general words, as the Case, 2 H. 3 4. before cited; and yet in the Case of a common person, all manner of Debts were released thereby, for that it shall be taken strongest against the party: Also he conceived, That the Lands in Reversion should pass as well as the Lands in possession. And he said, All former Leases of Record needed not to be recited, &c. but such Leases only which are made by the King; For Subjects may have Leases of Record, as by Fine; Deed enrolled, &c. but such Leases need not to be recited; For such Leases may determine without matter of Record, as Surrender, Re-entry, &c. and then to compel the King or the party to search for such Leases which might be so determined by any Act in pais, should be as absurd, as to compel him to search by what means, and for what matter in pais such Leases are determined. And he conceived, That this Lease needed not to be recited (which was made by King Henry the 8th) For after the said Lease made, the King granted the Reversion to the Bishop of Bath and Wells, and his Successors, and during the time that the said Land was to the Bishop; It might be, that the Lease was determined by matter in suit in pais, by Surrender, Forfeiture, &c. and then, notwithstanding that the King obtained the Reversion after, and will make a new Lease; if he should be driven to recite the former Lease, whereas perhaps it is determined by an Act in pais, it should be very inconvenient. Also here, if any recital should be in the Case, how might the party interested know such former Leases, but by search?

search? and how long ought the party search? for his search ought to have an end, Non excrefcere in infinitum tempus. And in our Case, the most equal time for search is the beginning of the last Title of the King, and no further; that is, from the present time till the time of the Title of the King begins; and in this Case the Title of the King doth begin from his repurchase from the Bishop; and if the Law be such, then here nothing is to be recited; for no Lease is mean between the re-purchase and the new Lease: For no Lease made before the re-purchase, need to be recited. For admit, That King Henry the 3d had made a Lease of a Mannor for 500 years, and afterwards granted the Reversion to an Abbot; and afterwards the Mannor by suppression came again to the King; and he will Grant a new Lease of the same, such Lease shall be good without any recital of the Lease made by King Henry the 3d for such Lease might have been determined in the hands of the Abbot by Surrender, or other matter in fact. So King Edw. the 2d made a Gift in Tail, and afterwards granted the Reversion to another, the Grantee disseised the Tenant in Tail: One who was Heir to the Grantee, was attainted of Treason, the Grantee died, by which the Land came again to the King, who made a new Patent of the same, without recital of the Gift in Tail, and the Patent holden good for the Cause aforesaid. And in some Cases there needs no recital of Leases. As if the King makes a Lease for years, rendering Rent to his Receiver, and for default of payment, that his Estate shall cease. Now if at the day the Lessee tendereth the Rent, and the Receiver will not accept of it; and afterwards it is found by Office, that the Rent was not paid, by which the Lease should be void (yet he may traverse the Office;) and afterwards the King Grants this Rent to a Stranger, there he needs not to recite the Lease; for it appeareth by the Office, That the same is void, and yet in truth the Lease was in Esse, &c. and so a Lease of Record in Esse in some Case needs not to be recited. So if the King Lease for years to J.S. and he assigns his Interest over, and afterwards Surrenders the same to the King; Now if the King will make a new Grant of it, he need not recite that Lease; for the Surrender of it appeareth of Record, and the Assignment of it is but matter in fact, which cannot be known by any search. So on the other side, void Leases which are not in Esse, shall be cited until it appear, as in the Case of Throgmorton cited before by Egerton; And in such Case where the Queen granted the same to Sir T.H. the Grant ought to be in possession; and not in Reversion, because then void, for the King had not a Reversion. Also this Lease ought not to be recited, for the second Patent is granted to the first Lessee; and so by acceptance of this new Lease, the first Lease is determined. And now we are to see, if the things in the former Grant are necessary to be recited, the Estate in the Land and the Tenant, not necessary; The Reservation, Condition; Covenant; and the Date. The reason where.

wherefore the Estate ought to be recited, is to this purpose, that the King might know, and be enformed how far the Land is encumbered with other Estates, &c. but that reason is of no effect in our Case, when the second Patent is made to the first Lessee; for by the acceptance of the new Estate, the first Interest is gone, wherefore of that there needs no recital. The second reason, wherefore such former Lease ought to be recited, is to the intent, That the new Patentee may not have colour or countenance by reason of his Patent to do wrong to the first Patentee who hath the present possession by disturbing of him by Entry, or Suit; for all the truth of the matter appears in his own Letters Patents, and the true Estate of the Tenant in possession: But that reason hath not any force in our Case; for the second Estate is made to him, who hath the former Estate. The reason wherefore the present Tenant ought to be mentioned in the second Letters Patents, is, so as the Queen may be ascertained what manner of person he is, who is the present possessor; for it may be, he is such to whom the Queen hath given such Estate upon special favour for his good Service, and in recompence thereof; and that she will not disgrace the party so much, as to give his Farm to another over his head, which might be much to the discomfort and prejudice of him in possession: which the Queen peradventure would not do, if she had full intelligence of it; but rather advantage him with it, and not let it to any other person. But in our Case here, there is not any such matter of mischief; But it is good to consider what Tenant ought to be specified in the Recital: Assuredly, the most sure way is, the Patentee himself to whom the Lease was originally made; although he be dead, or hath assigned his Interest over. For it may be dangerous to rely upon the Tenant, who hath the possession; for it may be, that another hath the Interest, although he hath the possession, and then the recital is false; wherefore it is best to say by way of recital, Cum dimissimus, &c. And as to the Land, the same also ought to be recited by the same name in such form, and by the same words as it was granted before in the former Grant; and yet if the name was misrecited in the former Grant, it ought not to be so in the second. As if the King Grant the Mannor of Little-Court by the name of the Mannor of Litt-cote, or the Mannor of Wellington, by the name of the Mannor of Welton, the same is good by the Statute. But if a new Grant is to be made of the same, in which the first Grant is to be recited; now the former misrecital shall not be put in ure, but the very name; but in this special manner, that is, where the King hath demised the Mannor of Little-cote, by the name of the Mannor of Litt-cote, &c. So where a Mannor is known by two names, and the Queen leaseeth the same by one of the said Names, and afterwards Grants the same by the other name; The Recital ought to be, That whereas the Queen hath demised the Mannor of D. by the name of the Mannor of S. &c. And as to the recital of the Estate, the Habendum in the first Patent ought

to be recited, and all that which precedes the Reddendum; for, in that, the Estate is fully contained. But here, in our Case, such recitals are not necessary; for it is impertinent to make recital of the same, which is determined eo instante, that the new Patent is made, and that by reason of a matter precedent, although that all be done eodem instanti; and as to an Instant, the same is not to be considered in Law, as it is in Logick; as a point of time, and not parcel of time. But in our Law, things which are to be done in an instant, have in consideration of law a priority of time in them: As Lessee for life makes a Lease for years, they both Surrender to him in the Reversion; the same Surrender which is made in an instant, shall in Law be understood to have degrees. The Surrender of Lessee for years to the Tenant for life, and then the Surrender of Tenant for life; So in our Case, the determination of the first Lease shall be first, 1 E. 3. 6. The Tenant took the Seignioresse to Wife, had Issue, the Wife died; the Husband shall not be Tenant by the Curtesie; for, although the Seigniorship was in him at the time of the Marriage, yet by priority in Law it ceases, so as no seisin of the Seigniorship was during the Coverture. So in our Case, eo instante that this new Patent is made, the first Estate is determined; yet in construction of Law, the Surrender shall be said precedent, and then the said Estate needs not to be recited. For if there had been an express Surrender in fact, there had not been any doubt, that recital was not necessary; Ergo, neither in the Case of a Surrender in Law. As to that which hath been Objected, That the Grant of the Queen cannot enure to two Intents; scil. to make a Surrender, and also to make a new Lease; The same Rule is true, where both Intents enure, and work against the King; But whereas the one Intent serves and works for the benefit of the King, it is otherwise: As in our Case, This Surrender is for the benefit of the King; therefore it shall be taken; et. as 6 H. 8. The King Grants Land to another, durante beneplacito, and afterwards the same Patentee purchaseth a new Estate from the King; here needs not any recital of the former, for the second Estate is made to the first Patentee, and the first Estate is determined by the acceptance of the second, 3 Eliz. The Case of the Earl of Arrundel was this, The Lord John Gray being Lessee for years of a House called Hull-rake, of the Lease of the Queen, afterwards took a Grant from the Queen of the Custody of the same Messuage, with a Fee for it, and that was without recital of the former Lease, and the Grant holden good, and yet it did enure to two Intents; to a Surrender of the Lease, and a Grant of the Custody, but both the Intents were not against the Queen; for the Surrender was for her benefit. As to the Lease made 13 Eliz. it is utterly void, for misreciting of the date of the former Lease made 2 Mar. for the very date of the said Lease was the 11th of May, and in the Recital it is the 21st of May. For although the date is not necessary to be recited, yet here, as this
Case

Case is, the same ought to be truly recited. For the Surrender of the said Estate which passeth by it, is the Consideration of the new Grant; then, if the same be false, the Patent is void, for it was made by reason of that: for there is a more ample Lease recited, than in truth it is by ten days. And so the Consideration, scil. the Surrender, not so beneficial as the Queen expected; also this new Patent doth contain in it self a Grant of such Lands as were demised formerly by Letters Patents, dated 21 of May, scil. *Omnia præmissa, in forma prædict. dimissa*, and nothing was demised in forma prædict. scil. by Patent bearing such date; Ergo, nothing passed by the later Patent. For the Patent of 13 Eliz. is in consideration of a Surrender of a Lease made and bearing date 21 of May, whereas no such Lease was, and then no Surrender, and then no Consideration. Also here the Consideration is false; for the Lessor who is supposed to have surrendered his Lease, before the same Surrender assigned parcel of his Term to one Hagget, and afterwards purchased a new Lease in consideration of the Surrender of the former, and of his full Interest in it, whereas he had not the whole Interest; and so this false consideration destroys the whole Grant. For in all Cases, where the considerations are real, and labour of the Land, or extend to such a real thing; if it be false, it destroys the Patent: But where the consideration is personal; as in consideration of Money paid, or for Service done, although it be false; yet the Patent may be good. So here, soasmuch as the consideration is real, in respect of this Surrender, and is false as appears before, the Patent is void: And as to this point, there is not any difference between Consideration and Suggestion; for if it be real and false, the Patent is void; contrary, where personal. But in some Cases where the Letters Patents are, *Ex certa scientia*, &c. such falsity in the reality shall not hurt. Which see 18 Eliz. *Dyer* 352. So the Case between Manxel and Turvil, where Lessor for years, his Lease being expired, supposing that he had twenty years of his Lease not entred; in consideration of such Interest, took a Patent de novo, the same was void. So Owens Case: Terril being Lessee for years of the Parsonage of P. in the County of Somerset, of the Grant of the King for certain years; In consideration of his said Interest, obtained a Grant of the Queen of Lands in Wales, whereas in truth he had before assigned his Interest in the said Parsonage to another; and it was adjudged, That the said Grant of Lands in Wales was void, for the Consideration was void; and so the Consideration being real, was false. And in some Cases, a Consideration personal, if it be false, shall destroy the Patent, if it be future and executory; as if the King Grants Lands to J.S. *ea intentione*, that he shall pay to J.D. 10l. Now if he do not pay it, the Patent is void, and the Estate given by it void also. It hath been Objected by Godfrey, That by this Surrender, the Patent was cancelled, and so the parcel of the Term which

which was assigned to Hagget, was defeated and avoided, so much as the Original Letters Patents out of which the Estate of Hagget was derived, are cancelled, and so there is a good Surrender, and then the Consideration is true; especially, so much as Hagget being Assignee but of parcel of the Term, cannot have a Constat by the Statute of 4 E. 6. As to that I conceive, That the Assignee of part of the Interest may have a Constat by that Statute, notwithstanding the Surrender of the Letters Patents, and the cancelling of them; and for that matter the difference is, If the Roll remains a Constat may be, although that the Patent be cancelled. See *Brook, Patents* 89. 32 H. 8. If a Vacat be entered upon the Roll, then no Constat can be afterwards; and therefore in *Sydnes Case*, the Assignee could not have a Constat, because there was a Vacat entered upon the Roll. But a Constat had before any Vacat entered upon the Roll; such a Constat is good, notwithstanding the Vacat afterwards: And it doth not appear, that any Vacat is entered upon the Roll; so for any thing that appears, Hagget may have a Constat, and then his Interest is saved to him, and then the Surrender is void, and the Consideration false; and although there be other Considerations in the Letters Patents, which are true and good, yet that shall not help the matter. For if any part of the Consideration be false, the Patent is void in all; and so it was holden in *Manxell's Case*, cited before; and so he prayed Judgment for the Plaintiff. Egerton Solicitor, to the contrary. Where the words *ex certa scientia*, are not put in Letters Patents; they shall be intended to be made at the suggestion of the Patentee, and so the Grant shall be taken beneficially for the King, and strictly against the Patentee: But where such words are put in the Letters Patents, there the Grant shall be taken beneficially for the Subject; These words, *Ex speciali gratia*, imply the bounty of the King, *certa scientia* excludes all ignorance, and *mero motu* shew the voluntary and liberal benevolence of the King, without suit of the party; and where the words in such Letters Patents are general, they shall be construed liberally for the Subject, but with limits and bounds, that nothing pass in such case, but such things which are aptly signified by such special words; as to pass two things, where the meaning of the King was to pass but one. And if the Patent be conceived *ut rogo*; *rogo* *et* *iam* *ex certa scientia*, &c. as upon the suggestion of the party; If the Suggestion be in any part false, the whole Patent is void, for the Suggestion extenuates the force of the other words, *Juris forensis est, si quid falsis precibus obtentum acquirenti non proderit*; and to that purpose he cited the Case, 18 Eliz. *Dyer* 352. before cited. And he conceived, That the Lease made by Queen Mary is utterly void.

1. Because the first Lease of Record is not rected.
2. If the same shall be good, the Queen should accept a Surrender, where she knew not of it; and so the Patent should enure to divers Intents.
3. This Lease is made by general words; that is, Of all the

Lands in the Parish of St. Cuthberts: For these general words may be well satisfied with the Lands which the King hath in possession; and therefore they shall not extend to the Lands which are now in Question, of which the Queen at the time of the Grant had but a Reversion; and first I conceive; That general words without any restraint or limitation, will pass nothing: As; if the King pardons all Demands, or Grants *Omnia terras & tenementa sua*; But, general words qualified with a restraint; where the Limitations are effectual; As, if the King Grants *Omnia terras & tenementa sua in D. which he hath by the Attainder of J.S. or which were the possessions of such dissolved Monasteries*, such Grants are good; And where the Case is, That Queen Mary hath the Lands in possession, of the annual value of 19 l. and other Land there in Reversion of the annual value of 6 l. and then she Grants *Omnia terras & tenementa nostra*, rendering 19 l. per annum. I conceive, That upon these words the Land in possession only passeth, because that the said general words may be aptly served and satisfied with the Lands in possession, if no other Lands pass. And I agree, That this word (*Nostra*) extends as well to the Lands in Reversion, as to Lands in possession; but most properly to Lands in possession: for Land in Reversion cannot dici simpliciter *Nostra*, but quodam modo tanquam terra revertens, and not to take the natural profits of it; for the Termor hath such property, that he shall have an Action of Trespass, *Quare clausum fregit*: But the intent and meaning of the Queen is to be regarded, and that is the surest way to have right intelligence of the Grants of the King; For here the Queen hath reserved but 19 l. Rent, which is the proper and ancient Rent of the Lands in possession; and if Lands in Reversion should also pass, the Rent of which was 6 l. per annum, then upon the whole Grant but 19 l. being reserved, the Queen should lose 6 l. per annum of her ancient Rent; which should be contrary to the intent and meaning of the Queen; and the intent of the Grantor, even in the Case of a Subject, shall direct the construction of Grants. As 9 H. 6. Br. Grants; by Babington. A Man grants Common in his whole Lands, he shall not have Common in his Orchards, Gardens, or Meadows, for such was the meaning of the Grantor, a fortiori in the Case of the King. It hath been argued, That the former Lease ought not to be recited, because that after the first Lease made by King Henry the 8th, the Inheritance hath been in a Subject, that is, the Bishop of Bath and Wells; but the same is not so: For if the King makes a Lease for years, and afterwards Grants the Reversion upon Condition, which after is broken, and so found by Office, by which the Reversion is reduced to the King; If now the King will make a new Lease, he ought to recite the former Estate, notwithstanding the mean grant of the Reversion, or else such second Lease is void. Another matter hath been Objected, wherefore the former Lease ought not to be recited; and

and that is, because it is determined by Surrender in Law, before that the new Lease takes effect; Sir, the same is not so, for the former Lease is in being, as the Case betwixt Fulmerston and Steward, 1 Mar. Plow. Com. 106. upon the Statute of Monasteries, 31 H. 8. See the words of the Statute, whereof and where in any Estate or Interest for years at the time of the making of any such Lease had his being or continuance. And an Abbot made such a Lease to one, who had a term for years of a former Grant; although here be a Surrender, yet this Case is within the said Statute, and the said former Lease shall be said to have his being at the time of the making of the later Lease; and the Surrender shall not be said so to precede the making of the Lease, but that the former Lease shall be said in Esse at the time of the making of the later Lease. And in our Case, it shall not be taken for any Surrender, for then the Queen shall lose 6 l. of her ancient Rent and Revenue; and always when the Title of the King and of the Subject concur, the Title of the King shall be preferred; as 43 E. 3. The King Lord, Mesne, and Tenant; The Tenant pays his Rent at the day to the Mesne before Noon, and then the same day before Night the Mesne dieth, his Heir within age, the King shall be paid the Rent again; for here the Title of the King and the Subject concur together at one time, and in that the King shall be preferred; and so he prayed Judgment for the Defendant. And afterwards at another day the Justices declared their Opinions, and by Wray, Chief Justice, We all agree, That the first Lease ought to be recited; and the reason which hath been urged against that point, hath reduced us to be of that Opinion, scil. That the second Lease was made to the first Patentee, and the King doth not make the recital; but the party ought to inform the King of all former Estates of the said Lands; and that he might well do, for he is well knowing of them; and although that the Reversion after the first Lease made hath been conveyed to a Subject, the same is not material here, forasmuch as the second Estate is made to him who had the first Estate, and might know whether the first Estate were determined or not; Also by the re-purchase, the King is in Statu quo prius. Gawdy Justice, although that the former Term be drowned by the taking of the second Lease; yet it was in being at the time of the taking of it, as it is holden by Bromley, in the Case of Fulmerston and Steward. It is determined by the second Lease, and yet it was in being at the time of the making of it. Fenner Justice, to the same intent. Clench Justice, If the Grant of the Queen shall enure to two intents, then the Queen should lose 6 l. per annum of her ancient Revenue. It was agreed by all the Justices, That the general words in as much as they are restrained to a certainty would pass the thing si cetera essent paria; contrary, if they had remained in the generality; and afterwards Judgment was given: Quod querens nihil Capiat per Billam.

CCCXXXVIII. Trin. 32 Eliz. In the Common Pleas.

4 Len. 233.

2 Roll. 797.
Plow. 347.

A Man 30 Eliz. made a Feoffment in Fee to the use of himself for life, and afterwards to the use of his Son and his Heirs; The Father and the Feoffees before issue for Honey by Deed, granted and enfeoffed J.S. and his Heirs, who hath not notice of the first use; The Tenant for life hath issue, and dieth, the issue entreth. Glanvil, the use limited to the first Son is destroyed; for without regrest of the Feoffees it cannot rise, and it is gone by their Liberty. See the Case in Plowden 349. and also he vouched the Case of the Earl of Kent, where by the Release of the surviving Feoffee, a Sleeping Use was destroyed, and could not after be revived. Harris, the use may rise, without entries of the Feoffees; and he put a difference between an use created before the Statute, and a use created afterwards; for in the first Case they ought to enter; and if they be disabled by any Act, as in the Case between Gascoign and the Earl of Kent, it shall never rise; but in the later Case, the whole authority and confidence is by the Statute taken out of the Feoffees, and the contingent use shall rise without aid of the Feoffees, by the operation of the Law; for there the Land is bound to the Uses, and charged with them: As upon a Judgment in a Warrantia Chartæ, the Land of the Defendant is bounden pro loco, & tempore; and according to the Common experience in Conveyances for payment of the Kings Debts; as in the Case between Proctor and Dennis, The Debtor of the King makes a Feoffment in Fee unto the use of himself and his Heirs, until he makes default of such a payment to the Queen at such a day, and upon default to the use of the Queen and her Heirs. Cowper, There needs no Entry of the Feoffees; and he put the difference put before by Harris, betwixt a Use created before, and a Use created after the Statute; and now the Feoffees have not any power to revive or to stand seised to such Uses, but are only as Instruments to convey the Uses. For the Use is created upon the Liberty, and is transferred by the Statute, if the person to whom the Use is limited be capable of it at the time of the limitation; but if not, the Law preserves it until, and it cannot be by any means prevented; and he cited the Case, 30 H. 8. Br. Feoffments to Uses 50 and there is a great difference betwixt a Use limited before and after the Statute: For now after the Statute, the Feoffees by reason of their seisin cannot be vouched; for they have not such a Seisin, whereof they may make a Feoffment, and he put the Case between Cheny and Oxenbridge; Cheny leased to Oxenbridge for 50 years, and afterwards enfeoffed Oxenbridge to the use of Cheny himself, and his Wife for their lives, with divers remainders over; And it was adjudged in the Court of Wards, That by the Feoffment the Term is not extinct; and he put the Case of the Lord Pagett, adjudged in the Kings Bench.

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A Feoffment was made to the use of the Feoffee for life, the Remainder to him whom the Feoffor should name at his death in Fee, and the Feoffor and Feoffees for good Consideration levy a Fine to a Stranger, and afterwards the Feoffor nameth, and dieth: The party named by the Feoffor shall have the Land, notwithstanding the Fine, &c. Beaumont, the contingent use is here utterly destroyed by the Feoffment aforesaid; and it appeareth by the preamble of the Statute of 27 H. 8. of Uses, That the motives of that Act did not savour Uses; but it was their meaning utterly to root them out: And if contingent Uses, which are not, nor can be executed by the Statute, should stand in force; the mischief should be, that no Purchaser should be secure of his Purchase, but should be in danger of a new boyn Use not known before. And he grounded his further Argument upon the reason of Manwood and Dyer, Where a Man makes a Feoffment in Fee to the Use of himself and his Wife which shall be, and afterwards he and his Feoffees, and those in Remainder make a Feoffment to divers other new Feoffees, and to new Uses, and afterwards he takes another Wife, and dieth: The said Justices were of Opinion, That by the said Feoffment, the contingent Uses were destroyed; For when the Estates which the Feoffees take, is taken away, which was the root and foundation of the Uses, and the branch and fruit of the said Tree; it necessarily followeth, that they also be taken away; and also because the Feoffees by their Liberty, are barred for to enter, for to re-continue the Estate would continue these Uses, they also are gone and extinguished. Yelverton, I conceive, that notwithstanding the Feoffment, that the Use shall rise in his due time according to the limitation of it, &c.

Mich. 32 Eliz. In the Common Pleas.

CCCXXXIX. The Serjeant's Case.

TENANT in tail, and he in the Remainder in Fee joyn in a Grant of a Rent charge in Fee, to the issue of Tenant in tail a year before the Statute of 27 Eliz. of fraudulent Conveyances; and afterwards the Tenant in tail, and he in the Remainder sell the Land; and afterwards a Præcipe is brought against Tenant in tail, who voucheth him in the Remainder, who voucheth the Common Vouchee, and so a Recovery is had, and lesſin accordingly; The issue in tail dieth without issue, Tenant in tail dieth, the Uncle distraineth for the Rent. Glanvil Serjeant argued, That this grant of the Rent is altogether the grant of the Tenant in tail, and that nothing passed from him in the Remainder; and that it doth enure as one entire Grant, and not as several Grants: As where Tenant for life, and he in the Reversion joyn in a Lease; it is one entire Lease, and the Lease of them both; and they shall both joyn in an Action of Waste. But admit that here are several Grants;

Grants, yet the Estate out of which the Rent was granted, continuing the Rent, shall continue also: And now the Recovery comes in the Post, and in the affirmation of the Estate of Tenant in tail; and the Remainder is utterly defeated and destroyed by the Recovery, and the Rent always issueth out of the particular Estate, and he cited, Littl. 125. If a Rent-Charge be issuing out of Land, and the Tenant of the Land leaseth the same for life, and afterwards the Rent is granted over; now he who hath the Freehold, ought to attorn, scil. the Tenant for life, for a Rent-Charge lieth always upon the possession; and if Tenant for life granteth a Rent-Charge, and afterwards makes a Feoffment in Fee, the Rent shall continue until the possession be recontinued, &c. Harris Serjeant contrary, This Grant is the Grant of them both, scil. of the Tenant as long he hath issue of his Body, and afterwards it is the grant of him in the Remainder: Where a Man derives his Interest from two, the one being a particular Tenant, the other a Recovery, or a Remainder in Fee; the Donee takes of each of them that which he may lawfully give, and no more; and the particular Estate being then ended, the Donee shall be then accounted in by him in the Reversion, &c. See 2 E. 4. 1. And he vouched the Case of the Lord Mountjoy, The Lord Mountjoy took to Wife a Woman Enheretrix, she had issue, and so he was intitled to be Tenant by the Curtesie, and acknowledged a Statute, and afterwards he and his Wife leyped a Fine, and died; Now the Conusee shall hold the Land discharged of the Statute; for after the death of the Husband, the Conusee is in by the Wife only; and so paramount the charge. Also he said, That this Grant of the Rent by the Father to the Son, is fraudulent, and so shall be intended, if the contrary be not shewed and averred. And so it was of late adjudged in the Court of Wards, Where a Man alieneth to his Son and Heir for Honey, (and Honey in truth is paid) yet notwithstanding it shall be intended fraudulent, unless the contrary be shewed and averred.

Hanham Serjeant, This Grant shall enure first as the Grant of Tenant in tail; and after the death of the Tenant in tail without Issue, it shall be the Grant of him in the Remainder. And to this purpose, he put Newdegate's Case, 7 Eliz. Dyer 234. Lessee for life, and he in the Reversion, Lease for years by Indenture, That during the life of Lessee for life, is his Demise only, and the Confirmation of him in the Reversion; but after the death of the Lessee for life, it is the Lease and Demise of him in the Reversion, and he shall have an Action of Waste ex dimissione sua propria, without shewing the special matter in the Count. And if Tenant in tail granteth a Rent in Fee, and he in the Reversion confirm the Grant, it is good. See Litt. 121. And he said, That the Recovery is in the Per; for it was holden in Winter's Case, That if a Man makes a Lease for years, rendering Rent, with clause of Re-entry, and afterwards suffereth a Common Recovery, That such

Such a Recoveror is an Assignee within the Statute of 32 H. 8. to take benefit of a Condition; and Recoveries are now common Conveyances. And if Tenant for life be, the Remainder over in Fee, and Tenant for life grants a Rent-Charge, and afterwards ceaseth, and the Lord recovereth in a Cessavit, he shall hold the Land charged. And as to the Collusion, it is not shewed in the pleading, That the Grant was made by Collusion: for if the Collusion be not apparent, the Justices, without averment of it, are not bounden to take Notice of it.

Cowper, Serjeant, Here are two several Grants, and one Grant intire in the Letter, may enure as several Grants, as if two Tenants in Common grant a Rent of 10 s. here are several Grants, and he shall have several Rents of 10 s. And if A. disseiseth B. of Black-Acre, and C. disseiseth B. of White-Acre, and afterwards by one Deed releaseth to A. and C. the same shall enure as several releases upon their several possessions. And he in his Argument relied much upon the Collusion, and this Grant shall be taken by the Justices to be fraudulent; for it was made 20 Eliz. and the Recovery was 21 Eliz. and in 27 Eliz. came the Statute.

Beaumont Serjeant, This Grant shall enure as several Grants; i.e. as a Grant of Tenant in tail, and afterwards as of him in the Reversion: Two Joynt-Tenants Enfants make a Feoffment, They shall have several Writs of Dum fuit infra etatem, as upon several Feoffments. 19 H. 6. 43. Two Coparceners take Husband, who discontinue, and die; their Wives shall have several Writs of Cui in vita: and yet the Discontinuance was joynt. And 15 H. 7. 14. If 3 Coparceners be, and upon partition one of them granteth to the two others Rent of 20 s. per annum for equality of partition, that Rent shall be in the nature of Coparceners, and so shall descend; and shall not go to the Survivor but by descent. See 21 E. 3. 50. Also admit that it is the Confirmation of him in the Remainder, yet after the death of the Tenant in tail without Issue, now it is become the Grant of him in the Remainder. And to that purpose, he cited Newdegate's Case, 7 Eliz. Dyer, before cited. But posito, that it be the sole Grant of the Tenant in tail, yet here is not any Covin apparent; for Covin apparent ought to be averred and proved; otherwise the Judges of our Law cannot adjudge upon it: for they cannot judge upon probabilities, as the Judges of the Civil Law do; for so they should many times minister Injustice in the place of Justice: And, that the same is not Covin apparent, although it be made to his Son, he vouched 19 H. 6. 30. and 47 E. 3. 16. Where such a Feoffment to re-enslave the Heir of the Feoffor when he cometh of full age, is not in it self Covin apparent, but it ought to be expressly averred. And he cited also Warnford's Case, 3 Eliz. Dyer 193. And also he cited 17 Eliz. Dyer 341. upon the Statute of 27 H. 8. of Monasteries, Where there is a Proviso, Forasmuch as some of the Chief Governours of
such

such Religious Houses have lately fraudulently and craftily made Leases, &c. to the great decay and diminution of their Houses, That all such Leases, &c. made within one year before the making of this Act, shall be void, &c. And also there is a Proviso, That such persons as have Leases whereupon the old Rent is reserved, shall enjoy their Leases, &c. The Case was, That an Abbot made a Lease for 60 years, 47 days before the making of the said Act, upon which the ancient Rent was not reserved: It was holden there, That although the Lease was within the words of the Statute, (because made within a year) yet it shall not be intended Covinous, without an express averment of it; for it may be it was made bona fide. See Librum.

Yelverton Serjeant, This is a joyned Grant; but yet it shall charge the several Estates when they come into possession. Also he put this Case, Cestuy que Use, and the Feoffees after the Statute of 1 R. 3. and before 27 H. 8. joyn in a grant of a Rent; It shall enure as several Grants in respect of their several authorities; scil. one by the Statute of 1 R. 3. and the other by the Common Law. And as to the Covin, he conceived, That it is Covin apparent, and needed not to be averred: and that appeareth by the suffering of the Common Recovery.

Hill. 32 Eliz. In the Common Pleas.

CCCXL. *Brokesby and Wickham's Case.*

1 Len. 167.
3 Cro. 173.
Owen Rep.
85, 86.

A Quare Impedit was brought by Bartholomew Brokesby, against the Bishop of Lincoln and Wickham, Pasch. 30 Eliz. Rot. 1815. The Case was, That Robert Brokesby was seised of the Manor of Sholby in Fee, to which the Abbotsdon was appendant; and, the Church being full, granted to Humphrey Brokesby and the Plaintiff his two Sons, the next Avoidance of the said Church; Afterwards the Church became void; Humphrey by Deed released all his right, estate, and interest which then he had of and in the Abbotsdon of the Church aforesaid for the said Avoidance. Bartholomew sole presented, and the Defendants did disturb him. The Bishop pleaded, That he claimed nothing but as Ordinary. Wickham pleaded a Lease made of the Manor with the appurtenances, by the said Bartholomew, to one Starkey for years, before the Grant made, ut supra, to Humphrey and Bartholomew; which Starkey presented him: Upon which they were at Issue, and found for the Plaintiff, That the Grant was before the Lease. It was holden by the Court, That this Release was merely void, for here was not any Interest to be released; but a power to present, and an Authority annexed to the person. And afterwards by the Award of the Court, the Writ was abated. See 11 Eliz. Dyer 253.

Hill.

Hill. 32 Eliz. In the Kings Bench.

CCCXLI. Woodward and Bagg's Case.

WOODWARD libelled in the Spiritual Court against Bagg and Nelson, for Tythes of certain Lands called Christen Hill. The Defendant sued a Prohibition, and surmised, That one Pretiman was seised of the said Land; and in Consideration of 5 l. by him paid to the said Parson, It was agreed betwixt them, That the said Pretiman and his Assigns should be discharged of Tythes of the Land, during his life, and afterwards the said Pretiman leased the same to the Defendants: upon which, a Prohibition was granted.

Roll. 63.
2 Len. 29.
3 Cro. 188.
Owen Rep.
103.

And it was holden, That the party need not to make proof thereof within 6 Months, for it is not within the Statute, because a Composition with the same Parson: But now a Consultation was granted, because the Agreement is shewed, but no Deed of it, which cannot be any discharge: But if it had been for a time; scil. unica vice, it had been good; but for life, not. Also it is not an express grant of the Tythes, but only a Covenant and Agreement, that he shall be discharged; upon which he may have an Action of Covenant, but not a Prohibition.

It was said on the other side, That although without Deed, Tythes cannot pass in point of Interest; yet by way of discharge they might.

Cook, It was holden betwixt Pendleton and Green, That upon such words of Covenant and Agreement, the party should hold the Land discharged of Tythes; which was denayed. For if the Grantee of a Rent-Charge will grant it to the Tenant of the Land, the same without Deed is not good. And there was very lately a Case between Westbede and Pepper, Where it was agreed betwixt the Parson and one of his Parish, That for 20 s. Rent by the year, the Parishioner should be discharged of Tythes for 20 years, if he so long lived. And it was holden, That no Prohibition should lie upon it; a fortiori, where the Estate is for life.

Gawdy, In the Case of grant of Tythes for life, a Deed is requisite, but here it is not; but a Contract for Money, &c. See 21 H 6. 43.

Wray, If it had been for years, it had been good enough; but here is not any Contract, but only a discharge for life; which cannot be during his life, without Deed. And afterwards, the Record was read; which was, That Concordatum & aggregatum fuit between the parties pro omnibus decimis during the time, that the one should be Parson, and the other Occupier of the said Land, That in Consideration of 5 l. the said Pretiman and his Assigns should hold the said Land discharged of Tythes.

Wray, The same is no Contract, but a Promise, for he doth not grant any Tythes. Afterwards a Consultation was awarded.

L I

Mich.

Mich. 32 Eliz. In the Common Pleas.

CCCXLII. *Sanderson and Ekins's Case.*

IN Debt upon a Loan by Sanderson against Ekins, who waged his Law; and at the day being ready to wage his Law, the Court examined him: And upon examination it appeared, That the Plaintiff and Defendant were reciprocally indebted the one to the other; And upon Conference betwixt them before the Action brought, there was an Accord betwixt them, That the Plaintiff should give to the Defendant such a sum, (which he had done) and that the one should go quit against the other. And it was the clear Opinion of the whole Court, That upon the matter the Defendant could not wage his Law; for a Debt cannot be extinguished by word.

Mich. 32 Eliz. In the Exchequer:

CCCXLIII. The Dean and Chapter of *Windsors Case.*

1 Len. 146.

IN this Case, It was moved, If he, who hath a Rectory impropriate, and by the Statute of 26 H. 8. is to pay an Annual Rent for the same in the name of a Tenth, and thereby is discharged of all First-fruits and Tenths, shall have the Priviledge of the Exchequer; for he is to pay the same sum yearly.

And it was the Opinion of the Barons, That he should not; for so every one who is to pay any Tenths or First-fruits, should draw other who have sued him into the Exchequer: And so all Controversies concerning Tythes and Parsonages should be drawn thither; which should be a great prejudice to the Spiritual Courts.

But Egerton, Solicitor, vouched a Case, viz. *Coniers's Case* The King gave a Parsonage to a Prioress in Frankalmoign, and the Tythes thereof being withdrawn, The Prioress impleaded him who withdrew the Tythes in the Exchequer; And it was holden, That the Prioress should have the Priviledge, for the King is endangered to lose his Patronage, or rather his Founder'ship, if the Rectory be evicted.

Gent, Baron, The Kings Tenant in Chief, or he who pays First-fruits, or he who holds of the Queen in Fee-farm, shall not have in such respect the Priviledge here.

Mich.

Mich. 32 Eliz. In the Kings Bench.

CCCXLIV. *Sledd's Case.*

Sledd of Great Melton in the County of Oxon, was assessed to 7 s. for a fifteenth: And upon refusal to pay the same, the Collector distrained the Beasts of Sledd, and sold them. Thereupon Sledd brought Trespass against him in the Kings Bench. And the Collector exhibited a Bill against Sledd; Who shewed by his Counsel, That the Statute of 29 Eliz. which enacted this fifteenth, Provides, That the said fifteenth shall be levied of the moveable Goods, Chattels, and other things usual to such fifteenths and Tenths, to be Contributory and chargeable. And shewed further, That his Beasts distrained fuerunt tempore distributionis, upon the Glebe Land of a Parsonage presentative, which he had in Lease; which Glebe Land is not chargeable usually to fifteenths granted by the Temporalty, nor the Cattel upon it. It was the Opinion of the Justices, That although the Parson himself shall pay Tenths to the King, yet the Lay Farmor shall pay fifteenths, and his Cattel are distrainable for the same upon the Glebe Lands of the Parsonage. And therefore it was awarded, That the Distress and the Sale were lawful. 2 Len. 146.

Pasch. 32 Eliz. In the Exchequer.

CCCXLV. *Sir Walter Water's Case.*

It was moved in this Case, That if one hath a Judgment by Debt, and upon the same within the year sueth forth a Capias ad satisfaciendum; although that he doth not prosecute it by the space of 2 or 3 years; yet when he pleaseth he may proceed upon it, and shall not be put to a Scire facias. And of that Opinion was Philips. 2 Len. 77.
4 Len. 44.

Manwood, I grant, That if one hath sued forth a Writ of Execution, and the same be continued by, Vicecomes non misit Breve for 2 or 3 years; yet the Plaintiff may proceed upon it, and shall not be put to a Scire facias: but if such a Writ be sued forth, and not continued, but discontinued by a year and a day, he shall be put to a Scire facias; for it is the negligence of the Plaintiff of not continuing it; which within the year and day he may do without Order of the Court; but not after the year by any Order of the Court, &c.

Mich. 32 Eliz. In the Kings Bench.

CCCXLVI. Evans, Godfrey, and Arnold's Case.

The Case was, Evans and Godfrey were bail for one Kemp, at the suit of Alice Arnold. Kemp was condemned, and a *Capias ad satisfaciend.* awarded against the Sureties: By which process, Godfrey was taken; and he suggested to the Plaintiff, That Evans the other bail was sufficient to satisfy him, but that he himself was not sufficient, but utterly unable to do it. Upon which surmise, the Plaintiff was content, that Godfrey should go at liberty, so as he did procure Evans to be arrested; who did it accordingly. And now Evans, being arrested, sued an *Audita Querela* upon that Escape of Godfrey; and they were at Issue upon the Escape. And afterwards, It was espied, That the *Venire facias* was to summon 12 in *Actione Transgressionis super Casum*; whereas it should be, in *Audita Querela*. It was said by Kemp, Secondary, That the *Venire facias* upon every Original Writ in this Court (as this *Audita Querela* is) ought to contain in it the Issue: But when the suit is upon a Bill, then the words are, *ad recognoscend.* in *Actione Transgressionis super Casum*. And afterwards, by the Advice of the Court, a Juroꝝ was withdrawn by Assent, and so the matter was stayed.

Mich. 32 Eliz. In the Exchequer.

CCCXLVII. Cheney's Case.

Roll 591.

Note, by the Barons in this Case, If Rent-Corn be reserved upon a Lease for years, and it is behind for 2 or 3 years, That the Lessor may have Debt for the Corn, and shall make his Declaration of so much Corn, and the same shall be in the Detinet; but yet he shall not have Judgment to have Corn, but so much Money as the Corn was worth every several year being accounted.

Clark, Baron, doubted, If he should recover the price of the Corn, as Corn was at the time of the Contract, or according to the price which it was at the time when it was payable; or as it was at the time of the Action brought.

Manwood, The Law is clear, That the Lessee shall pay according to the price which was at the time of the payment and delivery limited by the Lease.

Clark, A. is bound to deliver to the Obligor 10 Bushells of Wheat, and no place is limited where the payment shall be made; the Obligor is not bounden to seek the other party wheresoever, as in case of payment of Money; For the importableness of it shall excuse him. Which Manwood granted.

Mich.

Mich. 32 Eliz. In the Exchequer.

CCCXLVIII. *Philip Fines and the Lord Dacre's Case.*

The Case was, Tenant in tail of Lands, the Remainder in Chief, levied a Fine without the Kings Licence: And, If the Tenants of the Lord Dacres should be chargeable by the Fine; (For the Case was, that the Lord Dacres was Tenant in tail, the Remainder in tail to Philip Fines,) was the Question? It was holden by the Barons, That the Tenants should be discharged: But it was holden, That if the Conusor had any other Land with- in England, the Fine might be levied thereof. But the Question was, If the Tenants shall be put to plead in discharge of that which would be a great charge; or should be discharged without plea, because it appeareth by Record, that he who aliened, was but Tenant in tail in Remainder; For there was an Office of it which was pleaded by another in another cause. It was said, Where such matter appeareth of Record, as by Office, Livery, &c. there he need not to plead such matter in discharge, because the pleading of the same is to no other purpose but to satisfy the Court by a Record, that the matter is so as the party in his discharge hath alledged. And therefore, In this Case, the Barons gave Order, That the Process against the Tenants of the Lord Dacres should be discharged.

4 Len. 97.
Ante 241.

CCCXLIX. *Hill. 32 Eliz. In the Court of Wards.*

The Case was, A. gave Land to B. in tail, rendering Rent; B. suffered a Common Recovery with voucher unto the use of a stranger and his Heirs; It was the Opinion of some, That the Rent remained. And it was resembled to Littleton's Case, 231, 232. Lord, Heir, and Tenant; The Lord purchase the Tenancy, now the Heir is extinct; yet he who was the Heir shall have the surplusage of the Rent of the Lord now Tenant of the Land as a Rent distrainable of common right.

And it was said by Heskith, late Attorney of the Court of Wards, That it was lately the Case of the Lord De la Ware, That in such case, notwithstanding such Common Recovery, the Donor should have the Rent, although that his Reversion was gone.

But Cook was of Opinion, That the Rent was gone; For the Rent was incident to the Reversion, and there is not any question but that the Reversion is gone.

Mich.

*Mich. 32 Eliz. In the Common Pleas.*CCCL. *Gardiner and the Hundred of Reading's Case.*

Andrew Gardiner brought an Action upon the Statute of Winton of Hue and Cry, against the Inhabitants of the Hundred of Reading in the County of Berks; and declared of a Robbery committed by persons unknown on his House: It was the clear Opinion of the whole Court, That the Action would not lie; For that this Offence is not properly a Robbery intended by the said Statute to be pursued, but rather a Burglary: And Robberies, committed in the High-way only, are relieved within this Statute. And by Anderson, Every Man is bounden to guard his House at his peril for his own safety.

CCCLI. *Mich. 32 Eliz. In the Common Pleas.*

In a Replevin, The Defendant made Conusans as Bailiff to Greves and Rockwood, and said, That one A. was seised; and 6 Eliz. enfeoffed certain persons in Fee, to the use of his last Will: By which he willed, That his Feoffees should stand seised of the said Lands, until Greves had levied of the profits thereof 100 l. And against this Conusans, It was Objected, That here is no Devise; For A. at the time of the Devise had not any Feoffees. But the Exception was disallowed by the Court. And they cited the Case, 15 Eliz. Dyer 323. *Lingen's Case*, A. made a Feoffment in Fee to his use; and afterwards devised, That his Feoffees should be seised to the use of his Daughter; that the same was a good Devise of the Land. See 29 H.8. *Br. tit. Devise* 48.

*Mich. 32 Eliz. In the Common Pleas.*CCCLII. *Hambleden and Hambleden's Case.*1 *Len.* 166.3 *Cro.* 163.1 *And.* 38.

Note, The Case of Hambleden and Hambleden, (For the principal Case, see *Mich. 31 Eliz. Leon. 166. Lib. 1.*) was this Term adjudged, upon the Devise, That the Survivour shall be each others Heir. It was holden, That all the surviving Brothers are Joynt-Tenants, and although this word (Survivour) be in the singular number; yet in sense, upon the whole matter it shall be taken, and construed, as for the plural number; (Survivour shall be each others Heir) i.e. each Survivour, i.e. every Survivour; i.e. All the Survivours: and then, in this case, The Plaintiff and the Defendant being Joynt-Tenants, cannot maintain an Action of Trespass one against the other.

CCCLIII.

CCCLIII. Mich. 32 Eliz. In the Common Pleas.

By the Statute of 32 H. 8. cap. 37. The Executors of a Grant of a Rent-Charge, may distrain for the Arrearages of the said Rent in the life of the Testator, so long as the Land charged doth continue in the seisin, or possession of the Tenant in Demesne, who ought immediately to have paid the said Rent; or in the seisin of any other person or persons claiming the said Lands only by and from the said Tenant by purchase, gift, or descent, in like manner as the Testator might or ought to have done in his life-time.

It was now moved, If A. grant a Rent-charge to B. the Rent is behind: B. dieth; A. enfeoffeth C. in Fee, who divers years after enfeoffeth D. who divers years after enfeoffeth E. It was holden in this Case by Walmesley, Periam, and Windham, Justices, That E. should be chargeable with the Arrearages to the Executors.

Anderfon, Chief Justice, held the contrary. But they all agreed, That the Lord by Elcheat, Tenant in Dower or by the Curtesie, should not be chargeable; for they did not claim by the Party only, but also by the Law.

Trin. 32 Eliz. In the Kings Bench.

CCCLIV. Leverett and Townsend's Case.

In an Action upon the Case, for disturbing him of his Common; The Plaintiff declared, That he was seised in Fee of a Messuage and certain Lands; And that he and all those whose Estate he hath, have Common of Pasture in 16 Acres of Lands called D. from the time that the Corn is reaped, until it be sown again: And also Common of Pasture in Land called R. omni tempore anni, as appendant to the said Messuage and Land; and that the Defendant had plowed the said Lands and so disturbed him of his Common.

It was moved in stay of Judgment, That it appeareth here, that the Plaintiff was seised in Fee, and so he ought to have an Assise, and not an Action upon the Case.

But the Exception was disallowed by the Court. Vide inde; Ante 13: 2 H. 4. 11. 8 Eliz. Dyer 250. 11 R. 2. Tit. Action upon the Case, 36.

Mich:

Mich. 33 Eliz. In the Kings Bench.

CCCLV. The Chamberlain of London's Case.

5 Co.

THE Chamberlain of London brought an Action of Debt in the Mayor's Court in Guild-hall, grounded upon an Act of Common Council. See C. 5 Part, The matter was removed into the Kings Bench by Corpus cum causa: Fleetwood, Recorder of London, prayed a Proceſſendo. It was Objected, That they of London could not make Ordinances to bind the Subjects, as an Act of Parliament. To which, It was said by Fleetwood, That the Custom of the City is, That the Mayor and Aldermen, and four persons chosen out of each Ward by the Communalty, may make Ordinances, which they call Acts of Common Council, and they shall bind every Citizen and Free-man, and all their Customs are confirmed by Act of Parliament, and by Magna Charta, which hath been confirmed 52 times; and also by the Statute of 7 R. 2. For that King seized their Liberties, and drove them to pay for the Redemption of them 100000 Marks, and then the said King confirmed them unto them for ever; and therefore this Ordinance being made according to our Custom, ought not to be impeached: As in Case of matters of the Forrest, If one be punished for offending against an Ordinance made for the governing of the Affairs of the Forrest; you cannot remove the matter before you. So is the Law called Lex Idumnea, concerning Rivers and Fishing, in which are divers Ordinances, That none shall kill Salmon at certain Seasons of the year, and so of other Fishes: If one be punished by force of such Law, he shall not be relieved here; for the Law of the Land hath always allowed such particular Customs. And see F. B. If two Merchants put their Stocks together, and so Traffick together, and the one dieth, The Survivor shall not have the whole Stock, as the Common Law is, but the Executor of him that dieth shall have an Accompt against the other; and that is per Legem mercatoriam. Cook, to the same intent. This Act of Common Council is good, and according to the Law, that is, of Common Right. There are divers Statutes made for the true making of Cloth, and to take away the abuses and deceit in the making of it, and this Act of Common Council is for the well executing of the said Statutes; and I conceive, there is a difference in making of Laws by a Corporation; A Corporation may make an Act for the better executing of any Law established at the Common Law, but new Laws they cannot make; As those of a Town, who have used to have Common in certain Lands, they cannot make a By-Law, That such a one in such a Town shall not have Common there; but that none shall use his Common, but at such a time;

time; such a By-Law made, is good. See 15 H. 7. 21 H. 7. 40. See 8 E. 2. tit. Ailife 413. A Town had Common of Turbary in a Marsh, and divers of the Inhabitants of the Town had made Crenches in the said Marsh; and some had not a full foot of Land in the Town, and such persons by their Crenches which they had made there, used to carry Turfs out of the said Marsh by Boats, and sell them, unto the value of 20 Marks per annum, to their great private profit, and to the great grievance of the others. For which cause, It was provided by common assent of the Freeholders of the Lord of the said Town, That all the Crenches in the said Marsh should be stopped, so as from thenceforth no Turfs be carried in Boats by the Crenches. And there it was holden, That if the greater part of the Commoners assent, the same shall bind the others who have not assented; for ubi major pars, ibi totum: And then, if such Towns may make Laws; a fortiori, The City of London. Secondly, This Law is good by Custom; for they have used to make such Acts and Ordinances time out of mind, &c. and these Customs are confirmed by Act of Parliament; and also they may appoint a penalty, for to what purpose otherwise should they make an Act, Oderunt peccare mali formidine poenae. Also this Action is maintainable; for an Amercement in a Court Baron, an Action of Debt lieth. Gawdy Justice, 44 E. 3. 19. every one ought to assent. Wray, There the Ordinance made was to charge the Inheritance. but here it is only to charge their Goods; wherefore the assent of the greater part is sufficient. And afterwards, a Procedendo was granted. 1 And. 234

Mich. 33 Eliz. In the Kings Bench.

CCCLV. Pendleton and Green's Case.

Pendleton sued Green in the Spiritual Court for Tythes; who pleaded, That Pendleton was not lawful Incumbent, but one Taylor; and that plea, those of the Spiritual Court would not allow to the Parishioner to plead to the right of the Incumbency; and thereupon he prayed a Prohibition, for otherwise he should be twice charged for Tythes; and therefore a Prohibition was granted. Ante 203;
1 Len. 94

*Mich. 33 Eliz. In the Kings Bench.*CCCLVII. *Knevitt and Cope's Case.*

4 Len. 59.

Knevitt brought Ejectione firmæ against Cope, and declared, Quod, cum John Hopkins by his Indenture bearing date the 20 of May, 32 Eliz. had let to him his House and two Parcels of Land, containing 40 Acres of Land, Meadow and Pasture, apud Tythingham de Forecomb. in parochia de S. &c. upon Not guilty pleaded, The Venire facias was de Tythingham de Forecomb. Exception was taken by Cook, That the Declaration had not any certainty; for it is not shewed in certain, how much there was of Meadow, how much of Land, and how much of Pasture, there was contained in the said two Parcels of Land; and the Jury may find the Defendant guilty as to the Land only, but not to the residue. Also, he hath not shewed in the Declaration, When the Lease was made; but only saith, That by Indenture bearing date the 20 of May, &c. but doth not shew any day of delivery of the Indenture, for then the Lease takes effect.

To which Exception, It was said by the Court, That the Declaration as to that was good enough, for it shall be intended to have been delivered at the day of the date.

Ante 193.

Another Exception was taken to the Assize, Because that the Assize ought to be of the Parish, and not of Tythingham, &c. See 11 H. 7. 23, 24. Forcible Entry in the Manor of B. in B. the Assize shall not be [of the Manor of B.] but [of B.]

Gawdy, Justice, You shall never have a Assize of the Parish; for divers Towns may be in one Parish: but here the Assize is good of Tythingham, &c. for it may be that it is a Town.

Cook, It is but a Ville Conus, from which a Assize cannot come.

*Mich. 33 Eliz. In the Kings Bench.*CCCLVIII. *Taylor and Fisher's Case.*

Taylor brought an Action of Trespass against Fisher, for entering into his House, and taking and carrying away of his Goods. To which the Defendant pleaded, That, before the Trespass supposed, one A. was possessed of the said Goods; and the said Goods being in the House of the said Plaintiff, the said A. sold them to the Defendant; by force whereof he was possessed: And, so possessed, came to the Plaintiffs House where, &c. And by assent and licence of the Plaintiffs Wife, he entered into the said House, and carried

carried away the said Goods, &c. Upon which, there was a Demurrer. It was holden, That the same is no plea; for there is no Colour given to the Plaintiff; and the licence given by the Wife; is not any matter for the justifying of the Entry. And as to the Goods, the plea was holden good: For, if A. might sell them being in the House of another, and not in his own possession, is scrupulous to the Lay-people.

Wray, If the Goods of the Defendant were in the House of the Plaintiff with the knowledge of the Defendant, it had perhaps been a good plea; but that is not alledged here.

Cook, 30 E. 3. 23. In Trespass for breaking of his Pound, the Defendant said, That he came to the place where the Cattel were impounded, and there found the Plaintiffs Wife, to whom he offered Pledges for the Cattel impounded, to make Amends according to reason, and prayed to have deliverance of the Cattel; and the Plaintiffs Wife delivered them; without that, that he brake the Pound, &c. And it was said, That this want of Colour is but matter of form, which he ought to have alledged upon his Demurrer; or otherwise he shall not have advantage of it.

Wray Justice, The Defendant in his plea doth not meet with the Plaintiff; Therefore the plea is not good in substance: It was Adjourned.

Pasch. 33 Eliz. In the Common Pleas.

CCCLIX. Downhall and Catesby's Case.

IN a Formedon by Downhall against Catesby, the parties were at Issue; And it was tryed by Nisi prius. It was moved in Banco, because that some of the Jurors did eat and drink before that they gave their Verdict, That the Court would not receive the Verdict. 4 Len. 113.

The Court said, That we cannot do here; for we do not know if your Information be false or not; and that matter ought to have been examined by the Justices of Nisi prius, and they ought to certify us of it, and then we shall have good cause to stay it.

And it was then said there, That if any of the Jurors eat and drink before the Verdict at their own Costs, that the same doth not make the Verdict void: but otherwise, if it be of the Costs of the Plaintiff, or the Defendant.

Mich. 33 Eliz. In the Kings Bench.

CCCLX. *Withrington and Delabar's Case.*

IN an Appeal of Murder by Withrington against Delabar, of the death of her husband; The Defendant pleaded, never accoupled in lawful Matrimony: And pleaded over, Not guilty. The Plaintiff replied, Lawfully accoupled, but did not reply over to the Felony. It was moved, as a discontinuance of the whole.

Wray, If the Defendant pleads matter tryable at the Common Law, and over to the Felony, there the Plaintiff ought to reply to both; but where the first matter is not tryable by the Common Law, there the same is not needful. *Quod ceteri Iusticiarii concesserunt.*

Mich. 33 Eliz. In the Kings Bench.

CCCLXI. *Lake's Case.*

STEPHEN Lake, Commissary of the Bishop of Canterbury, Fr. Alredge, Register; and R. Hunt Apparitor, were indicted of Extortion, that they, colore officiorum suorum, had malitiose, accepted and received 11 s. 6 d. for the Absolution of one B. who was excommunicated; where they ought to have but 2 s. 6 d.

And Exception was taken to this Indictment, because that all their Offences are put together, scil. colore Officiorum suorum; whereas the particular Offence of every Offendor ought to be specially set down, but here they are confounded. Which see, by the Statute of 25 E. 3. 9. That Ordinaries shall not be impeached by such general Indictments, unless they say, and put in certain, In what thing, and of what, and in what manner the said Ordinaries have committed Extortion.

But that Exception was not allowed; for of that the party grieved cannot have notice, for they took in gross, and afterwards parted it betwixt them.

Another Exception was, Because it is not shewed, What is their due fee: And that was conceived to be a good cause of Exception: And if no fee be due, the same ought to appear in the Indictment. And afterwards the Opinion of the Court was, That they should be discharged.

Hill.

Hill. 33 Eliz. In the Common Pleas.

CCCLXII. *Doughty and Prideaux's Case.*

Action upon the Case by Doughty against Prideaux, for these words, Thou art a Wicked and perjured Fellow, and art forsworn in the Court of Star-Chamber, as appeareth by an Exemplification here under the Seal of this Court. The Defendant justified because of a Bill exhibited in the same Court, by one Brooks, against the now Plaintiff, for conspiring with another to endite the said Brooks of certain Felonies. And the Defendant now Plaintiff, in his Answer to the said Bill, denied upon Oath the said Conspiracy: And sentence was given in the said Court against the now Plaintiff, ubi revera such a Conspiracy was. The Plaintiff Replicando, said, That the said Brooks was Arraigned and Convicted upon the said Indictment, and prayed his Clergy. Whereupon it appeared, because the said Brooks was not Legitimo modo acquietatus, that the same could not be any Conspiracy in the now Plaintiff, to procure the said Brooks to be Indicted. 4 Len. 101;

Walmesley and Periam, Justices, This Replication is not good; For it may be that Brooks was acquitted, and yet the Plaintiff did Conspire, upon which a Verdict of Conspiracy perhaps would not lie, but an Action upon the Case without doubt: For the Replication doth not prove, That the Plaintiff did not Conspire, but that the Plaintiff was not punishable for such Conspiracy, &c.

CCCLXIII. *Pasch. 33 Eliz. In the Common Pleas.*

The Case was; An Abbot leased Lands to three Men for 80 years; and in the end of the said Lease was a Clause, That if they died within the said Term, that then the Lessor might enter. The possessions of the Abby came unto the King, who granted the Reversion to J.S. who made a new Lease thereof to J.D. for 21 years to begin after the expiration, determination, or surrender of the said former Lease.

The 3 Lessees died within the Term; If J.D. might now enter before J.S. hath entered, was the Question?

And it was the Opinion of all the Justices, That he could not; For it is in the Election of J.S. if he will take advantage of the Condition, and defeat the Lease; but that ought to be by Entry: and none can make such Entry but the Lessor himself, or by his express Direction, &c.

Pasch.

Pasch. 33 Eliz. In the Kings Bench.

CCCLXIV. Bond and Bayle's Case.

1 Len. 328.
1 Roll. 926.

Bond brought a Scire facias against Bayle's Administrator of one T.B. upon a Recovery against the Intestate in an Action of Debt. The Defendant pleaded before the said Judgment given, The Testator acknowledged a Statute-Staple to one B. and that the same was not paid in the life-time of the Intestate, nor ever after, and that they had not Goods of the Intestate in their hands above to pay the said Statute. Upon which, it was Demurred in Law.

Crook argued, That the Bar was not good; for here no execution upon the Statute is pleaded; and then the Judgment and the Statute being things of as high nature, that of which Execution is first sued, shall be first satisfied: And if this Action had been brought upon the Obligation, the Plea had not been good: For although that Brian saith, 21 E. 4. That Recognizances shall be paid by Executors before Obligations; yet that is to be intended, when a Scire facias is to be sued upon it: otherwise not. See 12 E. 3. Fitz. tit. Execution 73. In a Scire facias upon a Judgment in Debt given against the Testator; Enquiry was, What Goods the Executors had at the day of the Garnishment. And he said, It was moved, 20 Eliz. by Anderson, in this Court, In Debt upon an Obligation against an Executor, The Defendants pleaded, That the Testator was indebted to one A. and that they had not more than to satisfy the same; And it was holden no plea; unless they had pleaded further, That a Scire facias was sued forth upon the same.

But Wray said, That was not Law: And there is a difference when the Judgment is given against the Testator himself, and where against the Executors; For where Judgment is given against the Executors, the Judgment which was first given, shall be first executed: But if two Judgments be given against the Testator, he who first sueth Execution against the Executors, shall be first satisfied, because they are things of an equal nature; and before suit, it is in the Election of the Executor to pay which of them he pleaseth. See 9 E. 4. 12. As if two Men have Callies out of the Exchequer, he who first offers his to the Officer, shall be first satisfied; for before that, it is in the Election of the Officer which of them he will pay. And a Judgment is a higher Record, than a Statute; for the Statute is not a Record, but Debitum recordatum recognitum. And therefore, 19 H. 6. If the Release enrolled be lost, the Enrolment of it is not of any effect.

And, Pasch. 20 Eliz. Our very case was moved in the Court
of

of Common Pleas, In a Sine facias upon a Judgment given against the Testator, the Executor pleaded, That the Testator had acknowledged a Statute before, not satisfied, ultra which, &c. And it was holden no Plea; For a Statute is but a private and poquet-Record, as they then called it.

And, 32 Eliz. Between Coney and Barkham, the same Plea was pleaded, and holden to be no plea. Also, if this Plea should be allowed, great Mischief would follow; for then no Debts should be satisfied by Executors; For it might be, that the Statute was made for performance of Covenants; which Covenants peradventure shall never be broken. And afterwards, Judgment was given for the Plaintiff.

Mich. 33 & 34 Eliz. In the Kings Bench.

CCCLXV. *Butler and Baker's Case.*

See the principal Case Reported in Cook, 3 Part, 25. The Argument of Egerton, Solicitor General, in the said Case, under his own hand, was as followeth; viz. The disagreement by the Wife in pais, is good by the Common Law. An Agreement may be by word, Ergo, a Disagreement. If Husband and Wife Lease for years, rendering Rent, the Husband dieth, the Wife accepteth of the Rent, that Acceptance shall bind her, 15 E. 4. 17. 3 H. 6. 48. 48 E. 3. 13. 16 E. 4. 8. 11 H. 7. 13. 9 H. 6. 44. 10 H. 6. 24.

Poph. 87.
1 And. 348.
3 Co. 25.

Tenant in tail makes a Lease for years not warranted by the Statute, rendering Rent, and dieth, and afterwards the Issue accepteth the Rent, the same shall bind him; 21 H. 7. 38. 21 H. 6. 25. 14 H. 6. 26. 19 H. 6. 43. An Infant Leaseeth for years, rendering Rent, and at his full age accepts the Rent; 11 H. 7. 13. 21 H. 6. 24. 14 H. 8. 35. So where the Successor accepts of a Rent upon a Lease made by the Predecessor, 37 H. 6. 4. 8 H. 5. 10. 4 E. 4. 14. The same Law in Exchanges and Partitions, If the Wife accepteth of Dowry of the Land which her Husband hath taken in Exchange, she shall be barred of that Land which her Husband gave in Exchange, 6 E. 3. 50. 15 E. 3. in Bar. 125. 12 H. 4. 12. &c. And in all these Cases where there is an Agreement; and therein an Agreement implied, scil. An Agreement to the Lease, and a Disagreement to have the Possession, &c. And so Agreement to the Land received in Exchange; and Disagreement to the Land given in Exchange; and all that by word and act in pais.

And so here in these Cases, Estates are affirmed, and entered, and benefit of the possession waived and refused. So it is also of a Right and Title of Action, 21 H. 6. 25. The Lord entitled

led to have a Writ of Right upon Disclaimer, accepts a Rent of the Tenant; Now he is barred of his Action. 13 Aff. 3. The Disseisee accepts homage of the Disseisor, it is a good bar in an Assise. 21 Aff. 6. Pendant a Cessavit, the Tenant assented, the Lord accepted the Services of the Assentee, his Action is gone, 21 E. 3. tit. Dower, 63. A Woman entituled to Dower, accepteth homage of the Tenant, the same is a Bar of her Dower: And as it hath been said of Entries and Actions, of which a Man may refuse the benefit by word and Acceptance in pais: So is the Law also in Cases of Estates vested, if the party doth not Enter.

Husband and Wife Tenants in special tail; the Husband levyeth a Fine to his own use, and afterwards Deviseeth the Land to his Wife for life, the Remainder over, rendering Rent; the Husband dieth: The Wife Enters and pays the Rent; now she hath waived her Reverter, 18 Eliz. Dyer, 351. 10 E. 4. 12. The Tenant enfeoffed the Lord and a stranger, and made Livery to the stranger, although the Freehold vested in them both, yet if the Lord disagreeeth to the Feoffment in futuro, he cannot enter and occupy the Land, and he may distrain for the services, &c. If a Disseisin be made to the use of the Husband and Wife, and the Husband agreeth to it, the Freehold vests in the Husband and Wife; but the Wife is not a Disseisor, and after the death of the Husband, she may disagree unto the Estate by word. 12 E. 4. 7. And also an Agreement shall make her a Disseisor. See to the same intent, 7 E. 4. 7. and Litt. 129. Although that in such and the like Cases, the Estate vests in some manner, yet it shall never vest to the prejudice of the party without an express and actual agreement. And, that disagreement to an Estate in such manner vested, may be in pais and by word, seems by a Clause in the Statute of 27 H. 8. cap. 1. Where a Joynture is made after Marriage, there the Wife after the death of her Husband may at her pleasure refuse her Joynture, and have and demand, and take her Dower, her Writ of Dower, or otherwise; scil. by word, and Acceptance in pais. And if in a Writ of Dower, the Tenant will bar the Demandant, by Joynture made during the Coverture, he ought to say, Quod intrando agreeavit. See Litt. in Dower ad Offitium Ecclesie; If the Wife entreth and agreeth, the same is a good Bar in Dower, Litt. 8.

Now in the principal Case, When the Wife agreeth to the Devise of Thoby, and the same is executed by entry; now the same is a full Disagreement to Hinton.

It was afterwards Objected, That although it be clear, That the Wife may waive her Joynture in Hinton, by word and act in pais, without matter of Record; Yet some conceived, That this manner of Devise of Thoby is void by the Statute of 32 & 34 H. 8. The Statute enables to Devise two parts, or so much as amounts

amounts to two parts in value at the time of the death of the Deviser, for then the Will takes effect; which cannot be here in this Case; for at the time of his death the Joynture of Hinton was in force, and so continued, until the disagreement afterwards.

Also the words of the Statute are, Having a sole Estate in Fee-simple; but here the Deviser had but a Reversion in Fee expectant upon an Estate tail, &c.

As to the first Point, it was answered, That the Disagreement doth relate to the death of the Husband, and is now, as if no Joynture had been made ab initio. And here the Heir shall have Hinton by descent, and he shall be Tenant to every Præcipe; and if it be brought against him the same day that the Husband dieth, the Will shall be good by the Disagreement after, and the Heir shall have his age, &c. And if the Father had been a Disseisor, and had Conveyed the Land, ut supra; now by this agreement of the Wife, the Heir shall be accounted in by descent, and thereby the Entry of the Disseisor taken away.

And if the Heir in such case taketh a Wife, and dieth, by this disagreement after, the Wife shall have Dower of Hinton; and hath such a possession, quod faciet sororem esse heredem.

And if that the same day that the Husband dieth, the Heir levyeth a Fine, or acknowledge a Statute; or maketh by Indenture enrolled a Bargain and Sale of it; by the said agreement, Hinton shall be subject to such Acts of the Heir. All which Cases prove, That the Deviser upon this matter at the time of his death, had a sole Estate in Fee-simple in the Manor of Hinton; and that the third part in value descended to the Heir: and so the Devise of Thoby good.

It hath been Objected, That here is not an immediate descent of which the Statute of 34 H. 8. speaks; And here the Manor of Hinton doth not descend immediately; for there was a mean time between the Death, and the Disagreement; and so the Will void for Thoby.

To that it was answered, That this word, [immediate] sumitur dupliciter, re, & tempore, and shall be taken here immediate re & statu, scil. That a Reversion, or a Remainder dependant upon a particular Estate in possession which is mean, shall not be allowed for the third part descended; for a Descent which takes away an Entry, ought to be immediate; for a mediate descent doth not take away an Entry, Litt. 92. as the descent of a Reversion or Remainder.

And if this word [Immediate] had not been in the Statute; Then the Statute might have been construed, That it should be sufficient to leave the third part to descend in Reversion or Remainder; but this word [Immediate] makes it clear. And therefore the third part which descends, ought to descend immediate in

Re, re,

re, & Statu. Yet a Reversion upon a Lease for years, or for life, with the ancient Rent reserved, is sufficient, and is a good and immediate descent of the third part.

And this word here [immediate] to be construed *ratione temporis*, is a frivolous Construction; for the word, Descent, implies that; For there cannot be an expectant and future descent; For descent is clearly immediate without mean time. But here in this case, the word, immediate, is to be taken in both senses, *et re*, *et tempore*; For by the Relation of the Waiver, it is, as if no Joynture had been made, and the Heir is to have the profits of the Land from the death of his Ancestor: And so the descent of Hinton immediate, *et re*, *et tempore*; And, that the same time hath had such reasonable Construction, is now to see: The Statute of 18 H. 6 Cap. 1. is, That the Chancelor shall make Patents to bear date the same day that the Warrant was made, and not before.

It hath been taken, That if the Patents bear date after the Warrant entred, they are good. Which see, 19 Eliz. *Plow. Com.* 492. in *Ludford and Gretton's Case*.

The Statute of Acton Burnel is, That if the Extenders extend the Land too high, *statim respondeant illi qui fecerunt extent*. This word of time (*statim*) shall not be construed, that the Extenders shall pay presently, but that they shall pay without delay; i.e. at the day limited in the Statute. See 2 H. 4. 17, 18.

It hath been Objected, That it is a great inconvenience, that the King for his third part should attend the pleasure of the Wife, the time of her Election; and therefore the Will shall be void.

But the same is no inconvenience, for the Joynture never was actually in the Wife, to her prejudice, until she entred into the Land, &c. And now by the Waiver, the Joynture is avoided ab initio to all intents, as if it never had been made: So as the King shall be answered of the entire profits after the time of the death of the Husband; and may seize the whole Land presently, without staying the Election of the Wife, or taking notice of her Joynture.

And so are the words of the *Diem clausit Extremum*; *Tibi precipimus quod omnia Terras & Tenementa, of which, &c. et ea salvo Custodias donec aliud tibi praeceperimus*; And that may be before any Office found: And those who have any Interest in the Land, or otherwise may shew the same upon the Traverse of the Office, or in the Court of Wards, and have allowance of it; And so there is not any prejudice to the King: No more, than when Tenant in Knight-service Debisseth all his Lands, There Division is to be made, and the King hath not any prejudice by it.

In the true Construction of this Statute, it is very necessary to consider the Intention and meaning of both Statutes. And it is certain, That the said Statutes were made for the benefit of the Subjects, to enable them to dispose of their Lands for the preferment of their Wives, advancement of their Children, and payment of their Debts, whereof they were restrained by the Statute of 27 H. 8. of Uses.

The Savings in the said Statute are for the benefit of the King and the Lords; So as Provision is made not only for the benefit of the Subjects, but also for the profit of the King and other Lords.

The disability of the Subjects to dispose of their Lands, to the intents aforesaid, appears in the Preface of the Statute of 32 H. 8.

And the favour and grace of the said King towards his Subjects, to supply the necessity of Subjects, appeareth by the Prefaces of both Statutes.

The later Statute, is an Explanation of the former in divers Points.

The first Statute to persons, Having Mannors, &c. *Ex vi termini*, includes Tenants in tail, Joint-Tenants, Infants, Idiots, Feme-Coberts; but the same is explained by the later Act, to be of Fee-simple only, and of sole Estates, and to persons of sound memory, not of Coberture. And so, If the Kings Tenant Deviseth all his Land, the same is good for two parts of it; so if he Devise all which he hath in Fee-simple, and leaveth the third part to descend in tail.

This Statute shall be taken strict against the Heir: For the whole Scope and Intent of the Parliament was, to bind the Heirs, and to enable their Fathers to dispose, so as the third part be saved to the King and the Lords. And that is manifest, For the Estates made by Collusion are preserved, and by an express Clause in the Statute kept in force against the Heir; but void as to the Lords.

As to certain Readers Cases, which have been put to prove, That these Statutes ought to have a strict Construction, I conceive, *Nihil operatur*. A Man seised of one Acre by Disseisin, and of two Acres by good Title, all holden in chief by Knight-service, Deviseth the two Acres which he hath by good Title, and dieth, so as the Acre which he hath by Disseisin descends to the Heir being within age; the King seiseth, the third Acre is devised by Eigne Title; the Devise of the other two Acres is good against the Heir; for it is within the express words of the Statute, Having a sole Estate in Fee-simple. And yet by another Branch of 34 H. 8. the King for his time, shall have recompence out of the other two Acres; and he agreed the Law to be so: but the same doth not conclude our Case.

A Man seised of two Acres in Socage, and of one Acre holden by Knight-service in Chief of equal value, is disseised of the Acre holden in Chief, and Deviseeth the other two Acres in Fee, the same is a good devise; for it is within the first branch expressly, Having a sole Estate in Fee-simple, and not having any Lands holden by Knight-service; for during the disseisin, he hath not the Land whereof he was disseised, and therefore the devise is good for the benefit of the Devisee, and the Lord is not at any Mischief: For the Disseisee notwithstanding the Disseisin, remains Tenant of the Lord as to the Abowp, and the Lord shall have the Wardship of such Heir, and may enter upon the Disseisor, and so have a third part. And that Case was put out of Gilbert's Reading.

A Man seised in Fee of two Mannors of equal value holden by Knights-service in Capite; and a third Mannor of the same value is conveyed to him by Deed of Bargain and Sale acknowledged; and before Enrolment, he deviseeth the two first Mannors to J.S. in Fee, and dieth; and afterwards the Indenture is enrolled; yet the devise is not good for the said two Mannors by any Relation of the Bargain and Sale enrolled. That Case may well be agreed to be Law; for the Estate doth not vest in the Assignee before Enrolment, and so the Estate was not perfectly in the Devisee at the time of the Will; for although that the Enrolment shall relate to prevent all acts and charges made mean by the Assignor; yet it shall not relate to vest the Estate, from the time of the delivery of the Deed, for the Assignee cannot punish a Trespass Mean; And if the Assignee hath a Wife, and the Assignee dieth before Enrolment, and afterwards the Deed is enrolled, she shall not be endowed: but here shall be some descent to take away an Entry, yet the Heir shall have his age. But in our Case, it is otherwise; for by the Mortar, the Joynture was waived ab initio.

And he cited Carrs Case, 29 Eliz. in the Court of Wards, The King granted the Mannor of C. to George Owen in Fee, tenend. in Socage, and rendering 94 l. per annum; And afterwards granted 34 l. parcel of the said Rent, to the Earl of Huntington in Fee to be holden by Knight-service in Capite; and afterwards purchased the said Rent in Fee; And afterwards of the same Mannor entailed William Carr, who devised the same for the payment of his Debts; And it was holden, That the devise was good against the Heir. And the King was not entitled to Livery or Præier Seisin: And therefore the Defendant was dismissed. But peradventure the Queen shall have benefit of the Act. See Cook 3 Part, 30, 31. Butler and Baker's Case.

The King gives Lands unto A. in Fee, to hold by Knights-service during his life, and afterwards to hold in Socage; He may devise the whole: For at the time when the devise took effect, he was Tenant in Socage.

Lands

Lands holden in Knight-service, are given to J.S. in tail, scil. to the Heirs Males of his Body, the Remainder to the right Heirs of J.S. J.S. deviseth these Lands, and afterward dieth without Issue Male, the same is good for two parts; yet during his life, he had not an Estate in Fee in possession.

The Father disseiseth his Son and Heir apparent of an Acre of Land holden in Chief by Knight-service in Capite; and afterwards purchaseth a Mannor holden in Socage, and deviseth the said Mannor, and dieth, his Heir within age, the Devise is good for the whole, and the King shall not have Wardship of any part, and that in respect of the Remitter, and yet it is within the words, Having sole Estate in Fee of Lands holden; and within the Saving.

Tenant in tail of an Acre of Land holden of the King in Chief by Knight-service, seised of two Acres in Fee, holden, ut supra, makes a Lease for three Lives of the Acre entailed, reserving the accustomed Rent, and afterwards deviseth the other two Acres in Fee; and afterwards dieth seised of the Reversion and Rent; The same is a good devise of all the two Acres: And here is an immediate descent of the third part, for the same is within the words, In Possession, Reversion or Remainder, or any Rent or Service incident to any Reversion, or any Remainder. See the Statute of 34 H. 8.

A Man seised of three Acres of equal value holden by Knight-service in Capite, deviseth one to his Wife for her Jointure by Act executed; and deviseth another to a stranger, And the third to his Wife also; The King in this case shall have the third part of every Acre: But if the stranger waiveth the devise, the King shall have the Acre to him devised, and the Wife shall retain the other two Acres, and it shall not go in advantage of the Heir. So if he deviseth the said three Acres severally to three several persons, to each of them one Acre, and the one Waives the devise in one Acre, The devise of the other two is good; Or otherwise, the King shall have the third part of every Acre, &c.

CCCLXVII. Mich. 35 Eliz. In the Common Pleas.

5 Co. 29.

The Case was, An Infant was made Executor; And Administration was committed to another; viz. A. durante minori etate, who brought an Action of Debt against the Debtor, and recovered, and had him in Execution; and now the Executor came of full age.

It was moved, What should be done in this Case, and how the party should be discharged of the Execution; for the authority of the Administrator is now determined, and he cannot acknowledge satisfaction, or make an acquittance.

Windham, Although the authority of the Administrator be determined; yet the Record and the Judgment remain in force. But peradventure you may have an Audita Querela. But he conceived, That an Administrator could not have such Action; for that he is rather a Bailiff to the Infant, than an Administrator: (See Prince's Case, 42 Eliz. Cook 5 Part, 29.) Which Rhodes conceiveth.

A. was bounden unto B. in an Obligation of 100l. upon Condition, to pay a lesser sum: The Obligee made an Infant his Executor, and died: Administration was committed durante minori etate to C. to whom A. paid the Money: It was doubted, If that payment was rightful: or, If the Money ought to have been paid to both?

Windham, Doth it appear within the Record, That the Infant was made Executor, and that Administration was committed, ut supra? To which it was answered, No.

Then Windham said, You may upon this matter have an Audita Querela.

In this Case, It was said to be the Case of one Gore, 33 Eliz. in the Exchequer, in a Scire facias, by an Assignee of a Bond against an Infant Executor: He pleaded, That the Administration was committed to A. and his Wife during her minority. And it was adjudged no Plea.

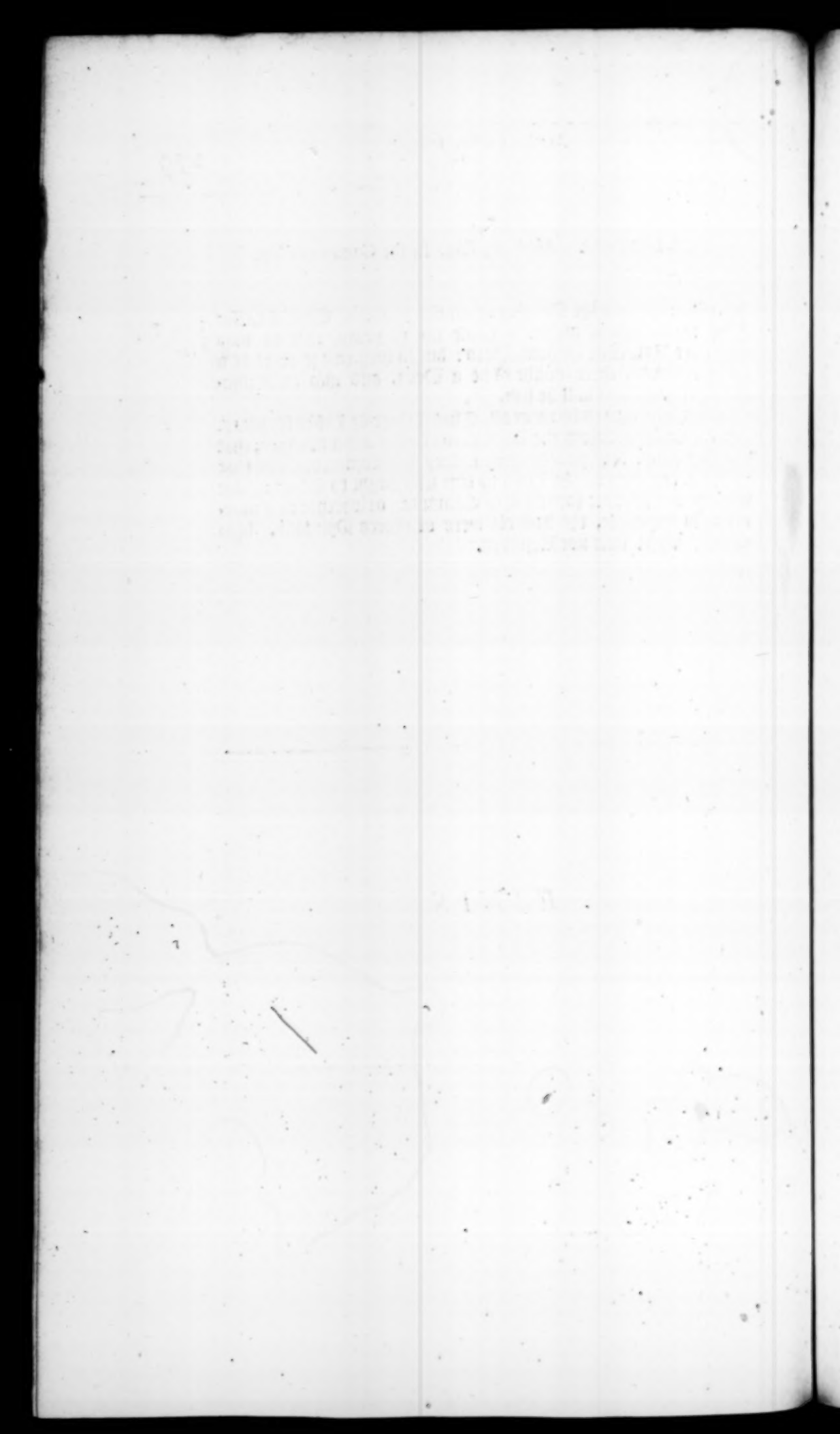
CCCLXVIII.

CCCLXVIII. *Mich. 35 Eliz. In the Common Pleas.*

NOte: It was the Opinion of all the Justices, That if Lessee for 20 years, makes a Lease for 10 years, that he may grant the Reversion without Deed: but in such case if there be a Rent reserved, there ought to be a Deed, and also an Attornment, if the Rent will be had. Jones Rep^s 243.

And it was agreed by them all, That if there be Lessee for years, and the Lessor granteth the Land to the Lessee and a stranger, that the Reversion shall pass without Liberty or Attornment; and that by the Acceptance of the Deed by him who ought to Attorn: But whether he shall take jointly or in Common, or whether in a moiety or in the whole, the Justices were of divers Opinions: Ideo Quære, for it was not Resolved.

FINIS.



A

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FINIS.